Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DANIEL GREIN and TIMOTHY BAKER

Petitioners

v.

CITY OF MENTOR, RICHARD AMIOTT, JULIAN SUSO, EDWARD WALSH, and RICHARD HENNIG.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should whistleblowers, i.e., police officers who report corruption in the workplace, be given a higher level of protection from retaliation under the First Amendment than others who speak out on matters of public concern but who are not reporting corruption?

2. Whether police chiefs and other public employers who are the subjects of corruption allegations by their subordinates should be able to decide whether those allegations disrupt the operation of their departments?

3. Whether the ruling of the Sixth Circuit Court of Appeals in this case creates a split among the circuits as to the level of First Amendment protection given to whistleblowers?

PARTIES TO PROCEEDING

Petitioners are Daniel Grein and Timothy Baker, who at all relevant times were police officers in the Mentor Police Department in Mentor, Ohio and were officers in the Mentor Patrolmen's Association, a union representing patrol officers in the Mentor Police Department.

Respondents are the City of Mentor; Richard Amiott, who at all relevant times was the Police Chief of the Mentor Police Department; Julian Suso, who was at all relevant times the City Manager for the City of Mentor, Ohio; Edward Walsh and Richard Hennig, who were, at different relevant times, the Presidents of City Council for the City of Mentor, Ohio.

In addition to these parties, the following were parties to the proceedings below:

Steven Graham, a former police officer for the City of Mentor, Ohio was a Plaintiff.

RULE 29.6 STATEMENT

None of the parties to this case are corporations; the petitioners are private citizens and the respondents are a municipality and several public officials.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Daniel Grein and Timothy Baker respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, issued November 29, 2004, is unpublished at 118 Fed. Appx. 27, 2004 U.S. App. LEXIS 25575. Petition for rehearing en banc was denied without opinion, unpublished order issued February 1, 2005.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its opinion on November 29, 2004, and its orders denying rehearing on February 1, 2005. (App. at 1a, 55a.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

RELEVANT STATUTORY PROVISIONS

This case is brought pursuant to 42 U.S.C. Section 1983 and the First and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit upholding a decision of the United States District Court for the Northern District of Ohio regarding the level of First Amendment protection given to police officers from Mentor, Ohio who blew the whistle on acts of corruption by their police chief.

(a) Petitioners believe this decision furthers a split within the circuits and misinterprets this Court's decisions in Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983).

(b) As a result of the Sixth Circuit's misapplication and misinterpretation of the above cases, petitioners and others who not only speak out on matters of public concern but who are legitimate whistle blowers, those who report corruption, are given virtually no First Amendment protection, because those being accused of corruption are actually placed in charge of deciding if the reports of corruption disrupt the police department. In reality, it is the acts of corruption which create disruption, not the reporting of corruption: petitioners and others like them who report corruption should be given a higher level of First Amendment protection such that those accused of corruption, like the respondents, cannot control whether petitioners are afforded protection under the First Amendment.

This case was filed in 2001 by petitioners Daniel Grein and Timothy Baker (as well as Steven Graham, who is no longer a party to this case). They had all been terminated from the Mentor, Ohio Police Department for a whole range of infractions, most of which involved speaking to the news media and making allegedly false statements about the Mentor Police Chief, Richard Amiott.

The petitioners, who were also officers in the Mentor Patrolman's Association, reported both through official administrative channels and through the news media that Chief Amiott had:

> a) Illegally voided parking tickets and influenced a local judge to drastically reduce the cost of moving violations, all for the chief's friends.
>
> b) Illegally attempted to take compensatory time to which he was not entitled.
>
> c) Created a ticket quota policy, whereby officers could be disciplined for not writing a certain number of tickets per month, possibly resulting in citizens receiving unfair speeding tickets so that officers could meet their monthly quotas.
>
> d) Carried a gun despite not having renewed his gun qualifications.
>
> e) Taken extra pay for being a "sharpshooter" despite not having qualified as a sharpshooter.
>
> f) Retaliated against them for having talked to the media.

There were no rules within the Mentor Police Department which barred officers from talking to the media, and the petitioners were never warned not to talk to the news media or to stop talking to the news media.

Chief Amiott brought petitioners up on internal charges, mostly stemming from their having talked to the news media about the above-stated allegations of corruption by Chief Amiott. Amiott recommended terminating petitioners (even though none had ever been disciplined

before and all were excellent police officers) and that recommendation was accepted by City Manager Julian Suso. Petitioners filed grievances pursuant to a collective bargaining agreement and Grein's termination was upheld, while Baker's termination was overturned. Baker was ordered reinstated with full back pay, with the arbitrator calling his conduct "whistleblowing at its finest."

While the internal charges were pending against petitioners, the then-City Council President, Edward Walsh, told Grein that the reason the petitioners had been fired was that the union "got too strong."

Petitioners filed suit in the United States District Court for the Northern District of Ohio pursuant to 42 U.S.C. Section 1983, claiming, among other things, that the terminations constituted violations of their First Amendment rights. The suit named as defendants the City of Mentor, Amiott, Suso, the two city council presidents who were in office at various times during the time period in question..

The District Court granted the defendants' motion for summary judgment. Appendix at 14a. Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, which upheld the District Court. Appendix at 1a. Petitioners filed a petition for rehearing En Banc, which was denied. Appendix at 55a.

The Sixth Circuit panel opinion held that not only was petitioners' speech protected as being a matter of public concern, but that "these allegations rise to a higher level" because they were exposing corruption.

However, the Sixth Circuit held, without citing any evidence of the nature or extent of the disruption, that petitioners lost that protection because their speech was "reasonably calculated to create division" because of its

potential negative effect on the public and that the police chief "cannot be expected to 'tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships' and a city cannot be expected to tolerate officers who use both the media and disruptive behavior in the workplace to influence personnel changes. (citations omitted)"

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted for several principal reasons. First, the Court of Appeals opinion conflicts with decisions from other circuits in interpreting the level of First Amendment protection that is or should be given to whistleblowers.

Second, and perhaps more importantly, we live in an era in which every day brings new revelations of corporate and government greed and corruption. Those who have the fortitude and who are in a position to expose that corruption should be given a higher level of First Amendment protection than others who merely speak out on non-corruption matters of public concern.

As a matter of public policy, once it had been determined that public employees are exposing corruption, the law should not allow those who are accused of corruption to define whether the reports of corruption disrupt the department. Any balancing that is done should weigh heavily in favor of the whistleblower. It is hard for petitioners to fathom that on one hand they can be protected because they are exposing corruption, but on the other hand they lose that protection because the person they are (accurately) accusing of corruption believes that those accusations disrupt the department. It was the various acts of corruption by the police chief that disrupted the department, not the actions of

petitioners in exposing them. Instead of punishing the wrongdoer, this case has become a classic example of shooting the messenger. This Court can send a strong message that whistleblowing deserves a higher level of protection than other forms of protected speech and it should do so.

1. Conflict in the Circuits

Other circuits, faced with similar facts to the case at hand, have ruled in favor of plaintiffs' First Amendment rights.

In O'Donnell v. Yanchulis, 875 F.2d 1075 (3rd Cir. 1989), the Third Circuit held that any weighing of the disruption factor should favor the employee. In that case, a police chief was told by his superiors, the township supervisors, to "fix" citations. He refused, told a local television station about the demand and was terminated.

In reversing the District Court's grant of summary judgment to the defendants, the Third Circuit said:

> A finding of disruption, however, is not sufficient to a determination that the employee's speech is not protected. The First Amendment balancing test [of Pickering] can hardly be controlled by a finding that disruption did occur. An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office....The point is simply that the balancing

> test articulated in Pickering is truly a balancing test, with office disruption or breached confidences being only weights on the scales.

O'Donnell v. Yanchulis, supra at headnote 5, internal citations omitted, emphasis in original.

The Third Circuit also took into account a factor totally ignored by the Sixth Circuit in the instant case; namely, the public's interest.

> The public's interest in having "free and uninhibited debate on matters of public importance" is "the core value of the Free Speech Clause of the First Amendment." Pickering, 391 U.S. at 573. The public has a significant interest in encouraging legitimate whistleblowing so that it may receive and evaluate information concerning the alleged abuses of these public officials. This interest is particularly acute where, as here, the information of alleged illicit activity might not otherwise be available to the public.

O'Donnell v. Yanchilis, supra at 1062.

In O'Brien v. Town of Caledonia, 748 F.2d 403 (7th Cir. 1984), the Seventh Circuit said of a police officer who breached a departmental rule by discussing an internal investigation publicly (one of the charges against petitioners in the instant case):

> The subject matter of his communications, i.e., his perception of potential graft and corruption, is deserving of vigilant protection by the First Amendment. Furthermore, the

> public's interest in being informed of serious governmental misconduct is very great....That is, while we don't wish to encourage disobedience in pubic employees, neither can we permit a governmental body to insulate itself from public scrutiny by declaring all of its official business to be confidential.

O'Brien v. Town of Caledonia, 748 F.2d at 407.

As the Ninth Circuit said in Rivero v. City and County of San Francisco, 316 F.3d 857 (9th Cir. 2002):

> Whistleblowing is a particular kind of speech on matters of public concern. It was already the law of this circuit in 1993 that the state's legitimate interest in "workplace efficiency and avoiding workplace disruption" does not weigh as heavily against whistleblowing speech as against other speech on matters of public concern. As we wrote in 1988, in Roth v. Veteran's Administration, 856 F.2d 1401, 1407-08 (9th Cir. 1988), (quoting Czurlanis v. Albanese, 721 F.2d 98, 107 (3rd Cir. 1983)):
>
> > An employee who accurately exposes rampant corruption in her office no doubt may disrupt and demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.

See also Hufford v. McEnaney, 249 F.3d 1142, 1149 (9th Cir. 2001) ("Employers cannot be said to have a legitimate

interest in silencing reports of corruption or potential illegality.").

Rivero v. City and County of San Francisco, 316 F.3d at 866 (9th Cir. 2002).

See also, Porter v. Califano, 592 F.2d 770 (5th Cir. 1979); Monsanto v. Quinn, 674 F.2d 990 (3rd Cir. 1982).

These other decisions are the correct balancing of the employee's First Amendment rights, the employer's right to control disruption in the workplace, and the public's right to know. The Sixth Circuit gave too much weight to the employer's right to control disruption, especially in light of the fact that it was the police chief--the target of the corruption allegations--who made the determination that petitioners' speech was disruptive.

This split in the circuits calls for this Court to grant certiorari in order to interpret the Pickering balancing test specifically as it relates to whistleblowers; when a public employee reports corruption, does he deserve a higher level of protection than others who speak out on matters of public concern, despite whatever disruption may result, as the Third, Fifth, Seventh and Ninth Circuits have held? Or does the employer get to decide that the potential disruption caused by employees' allegations of corruption outweigh the benefits of the reporting of corruption, as the Sixth Circuit ruled?

This Court must resolve this issue, because it is vital that public employees nationwide know what the legal standards are and that those standards are consistent; had petitioners made the same allegations of corruption in the Third, Fifth, Seventh or Ninth Circuits, their conduct would have been protected speech and they would at least have

gotten past summary judgment. In the Sixth Circuit, they were terminated and their terminations upheld.

2. Whistleblowing should be encouraged and given a higher level of protection than other speech on matters of public concern.

More important than a consistent legal standard is what that legal standards is. On the merits, the Third, Fifth, Seventh and Ninth Circuits have it right; those who report corruption should be given a higher level of protection than others who report on matters of public concern. The balancing test should weigh heavily in favor of protecting whistleblowers.

The federal Whistleblower Protection Act defines whistleblowing as "any disclosure of information...which the employee or applicant reasonably believes evidences -- (i) a violation of any law, rule or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety...." 5 U.S.C. Section 2302(B)(8)(A).

While federal employees enjoy a certain amount of protection from retaliation for whistleblowing under the federal whistleblower statute, in reality, state and local public employees enjoy no such protection under the First Amendment. Even when exposing corruption, as petitioners did, the end result can be (and in this case was) termination. This Court needs to revisit the Pickering balancing test by enunciating a new standard that applies specifically to whistleblowers.

One commentator has suggested that in order to justify retaliation against a whistleblower, a government employer should have to meet a strict scrutiny test.

Under a strict scrutiny analysis the government would have to show a compelling justification for punishing the whistleblower and no less drastic means [are available]. Disruptive potential would clearly be insufficient to meet this strict scrutiny analysis. Further, since it is evident that disclosing government wrongdoing will cause some disruption in the office, this, too, should ordinarily be insufficient to sanction the speech. Similarly, assertions of disloyalty, insubordination, or outspokenness, which are highly subjective and difficult to disprove, should be closely scrutinized. As one professor observed, "government employees are not expected to be 'loyal to the company' especially when loyalty constitutes a betrayal of the public."

Although the government as an employer has legitimate interests in the smooth, efficient operation of the office, speech which discloses wrongdoing and inefficiency helps to promote and not inhibit that government interest.

****

In short, by defining "whistleblowing" as speech that addresses a matter of public concern and by providing protection for such speech absent a compelling justification, regardless of the status of the employee, government employers will be on notice that they will be answerable for adverse employment decisions. Further, government employees will know that their disclosure will

> be insulated from retaliatory action, and thus they will be encouraged to come forward. Most significantly, the public will not be deprived of information that is truly critical to ensuring that government operates in the public interest - efficiently and effectively.
>
> Levinson, Rosalie, "Silencing Government Employee Whistleblowers in the Name of Efficiency", 23 Ohio N.U.L.Rev. 17 (1996), 65, 69.

Petitioners ask this Court to grant certiorari on this case in order to more fully articulate its views on whistleblower protection. Public employees who expose corruption should be given the highest possible level of protection, and they should not be subject to termination or other forms of retaliation for allegedly disrupting the workplace by the very officials who they are accusing of corruption. Any disruption in the workplace is caused by the corrupt official, not by the employees who seek to expose that corruption.

Rather than viewing petitioners' conduct as disruptive conduct by the petitioners, the Court, at the summary judgment stage, is required to look at it in a light most favorable to the petitioners, the non-moving parties, i.e., that it was the chief whose conduct was disruptive, that it was the chief who was engaged in a "you're either with us or against us" battle. By regularly fixing parking tickets and walking friends through to the judge to get reductions on moving violations (Chief Amiott admitted fixing parking tickets and helping friends get moving violation fines reduced about five times per month each), the Chief was not only violating departmental policy, but he was undermining the legitimate law-enforcement functions of the police department. The

officers who had written valid parking tickets and valid moving violations watched helplessly as the chief allowed scoff-laws off the hook because of their connections to him. Officers wrote valid tickets only to have the miscreants go over their heads to get the ticket fixed by the chief.

In addition, the Chief took compensatory time to which he was not entitled, potentially costing the City of Mentor tens of thousands of dollars; he was not range-qualified by City standards, and yet carried a gun; he took extra pay that was given to officers who qualified as "sharpshooters," yet he never took the required qualifications tests; he threatened to punish petitioners for speaking to the news media, by launching an internal investigation against petitioners, when no rule or regulation prohibited speaking to the media, then terminated petitioners for informing the public via the news media that they were the subjects of an internal investigation (when such information had already been publicly revealed).

The actions of the chief in fixing tickets and these other acts of corruption were divisive and disruptive. And then when the chief was exposed by the petitioners, not only did the city manager refuse to investigate, but the petitioners became the subject of an internal investigation (that led ultimately to their terminations).

This corruption and cover-up, and not any action by the petitioners in exposing the corruption, led to disruption within the department. Amiott caused a legitimate fear amongst the troops: "If you cross me or you report to the public my illegal activities, you'll pay." As of this day, the Chief has gotten away with these fear tactics, because of the decision of the Sixth Circuit. (Even if causing disruption in the reporting of corruption is a legitimate reason to retaliate against petitioners, there was never any evidence—other than the fact that there were numerous news articles—that

the reporting of corruption caused any disruption at all in the police department. Throughout its opinion, the Sixth Circuit took disputed facts and resolved them in favor of the respondents, when at the summary judgment stage, such factual disputes, such as whether there was any disruption within the department and whether petitioners' tactics were disruptive, should have been viewed in a light most favorable to petitioners.)

The Sixth Circuit placed the power to make First Amendment decisions into the hands of the very person who was the target of the corruption charges. The Sixth Circuit stated:

> "When officers' speech is 'reasonably calculated to create division,' the speech may be unprotected because of its potential negative effect on the public. (Citation omitted.) Furthermore, a police chief cannot be expected to 'tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships,' (citation omitted), and a city cannot be expected to tolerate officers who use both the media and disruptive behavior in the workplace to influence personnel changes." (Citation omitted.) Appendix at 10a, emphasis added.

The petitioners' speech was not reasonably calculated to create division; it was reasonably calculated to expose corruption. Amiott had created division by fixing tickets, taking comp time to which he wasn't entitled, taking extra pay for range qualifications he did not earn, neglecting his own range qualification and lying about it. It was not the petitioners' speech that created a "potential negative effect on

the public." It was the Chief who did that by violating the law and then punishing people who reported it.

It would be absolutely true that the police chief should not "be expected to 'tolerate action which he reasonably believed would disrupt the office, undermine his authority and destroy close working relationships'" if the chief himself were not the target of the corruption allegations. It was not the reporting that disrupted the office, undermined the chief's authority and destroyed close working relationships; it was the chief's own conduct and his retaliatory reaction to his conduct becoming public. In this case the chief was the target of numerous serious allegations of corruption. Why, then, should he be able to control the situation? The Sixth Circuit stated that if the chief "reasonably believed" the petitioners' actions would cause disruption of the office, an undermining of his authority and the destruction of close working relationships (even without any actual evidence of disruption, undermining of authority or destruction of close working relationships), he was permitted to fire those who were causing it. Appendix at 10a. Yet how can the chief "reasonably believe" anything when he is the target of the allegations and he is, in fact committing the corrupt acts of which he is accused?

To allow the Sixth Circuit's decision in this case to stand would be for this Court to say, in essence, that no matter how corrupt the police chief is, no matter how much protection the petitioners acquire as a result of blowing the whistle, they can still be fired if their whistleblowing causes disruption. Thus, because such whistleblowing causes disruption per se, there would be no circumstances under which petitioners would ultimately be protected from retaliation. Certainly, this concept cannot stand consistent with a First Amendment that is supposed to protect public employees from retaliation for exposing corruption by a public official.

To say that the officers' complaints about the chief's corruption were in and of themselves disruptive and threatening to the chief's authority would be to say that Connick and Pickering have no meaning at all, because it means that there would be virtually no way for the officers to complain about the chief's corrupt conduct without "disrupting" the department and undermining the chief's authority such that it garnered First Amendment protection. In other words, there is no balancing being done here, because, according to the Sixth Circuit's reasoning, the officers' reporting of corruption, by definition, is disruptive and undermines the chief's authority.

If that is the case, then in all circumstances of speech that is critical of the chief (even if reporting corruption), the chief will be permitted to decide if he "reasonably believes" the speech will "disrupt the office, undermine his authority and destroy close working relationships."

And if that philosophy holds sway, then labeling certain speech as a matter of public concern--or even whistleblowing--also becomes meaningless. What difference does it make if speech is on a matter of public concern, even a "higher level" of public concern, if the officers are ultimately going to lose any First Amendment protection they acquired by virtue of whistleblowing? What difference does it make that the officers reported corruption and spoke out on matters of public concern if, by definition, that speech disrupted the department?

Of course it disrupts the department and undermines the chief's authority. A corrupt chief should be disrupted; his authority to fix tickets and punish those who report it should be undermined.

What Pickering requires, according to Connick, is "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." Connick, 461 U.S. at 150.

The City of Mentor's interest in the effective and efficient fulfillment of its responsibilities to the public did not involve allowing Amiott to fix tickets, take comp time and sharpshooter pay that he didn't deserve, and unfairly punish people who called him out for his conduct. Mentor's interests in the effective and efficient fulfillment of its responsibilities to the public involved stopping Amiott's conduct.

This case is similar to the situation in Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986), where the employee aided in a fraud investigation in a government agency and then received negative references from his old employer. The Marohnic court said: "When an employee exposes unscrupulous behavior in the workplace, his interests are co-extensive with those of his employer; both want the organization to function in a proper manner." Marohnic at 616.

Marohnic says what petitioners are saying here: When an employee exposes corruption, it should be very difficult for the Pickering balance to tip against him, because exposing corruption, by definition, furthers the government's interest in the effective and efficient fulfillment of its responsibilities to the public. When an employee exposes corruption, he cannot be disruptive because he is, by definition, furthering the interests of his employer by helping to function in a proper manner.

The Marohnic court apparently was not able to conceive of a situation in which an employee could expose public corruption and still lose his First Amendment

protection merely because the exposing of public corruption was considered--by the person who was exposed--to be disruptive of the government's interests in efficiently fulfilling its responsibilities toward the public.

The Sixth Circuit's decision in this case stands for the proposition that one can expose public corruption and still not be protected because the exposing of corruption is considered disruptive by the corrupt official, thus wiping out Connick, Pickering, and Marohnic in one fell swoop.

"Public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law," when "exposing graft and corruption," and when "seeing that public funds are not purloined" or wasted. Marohnic v. Walker, 800 F.2d 613,616 (6th Cir. 1986). "Speech disclosing public corruption is a matter of public concern." Solomon v. Royal Oak Township, 842 F.2d 862,865-66 (6th Cir. 1986).

What meaning do these cases have after this case? One can speak out on matters of public concern, a public concern that is near its zenith. And yet the speech is not protected from retaliation because the chief--the very target of the corruption allegations--believes that the speech is disruptive. Of course he believes it is disruptive, but given that he is the target of corruption allegations, this Court should not allow him to be the final arbiter of what is disruptive and what undermines his authority.

This decision, if it stands, severely curtails the First Amendment rights of legitimate whistleblowers and undermines the precedent of other cases in other circuits. Future potential whistleblowers will be chilled by this decision, because it says that no matter how corrupt the chief is, no matter how solid the evidence, be careful what you say and to whom you say it. Don't talk to the media, even if you

believe the official channels will be closed, because that will be viewed as disruptive. Don't call for the resignation of a corrupt chief, because you will be accused of attempting to influence personnel changes. Don't gather evidence in support of your corruption allegations, because you will be accused of illegally obtaining documents.

In short, don't report the corruption, because you will be fired and the courts will not protect you. Do not uphold your sworn oath to uphold the law because it doesn't apply to certain people. You can catch criminals, but if you see one within your own police department and he happens to be your boss, ignore it and allow it to happen. Allow the friends of the chief to get their tickets fixed; allow the chief to rob the public coffers by taking comp time to which he is not entitled; allow the chief to carry a gun and put the public in danger even if he doesn't go to the shooting range to prove he is qualified. Allow the chief and the city manager to retaliate against you and others by conducting witch hunts of internal investigations, by manufacturing evidence in an attempt to build up criminal charges (all of which happened in this case) and ultimately by firing you in direct retaliation for your reporting of corruption. Allow all of this to happen, because no matter how you choose to report it, you will be punished and have no recourse.

This is the message of this case as it currently stands and it is of exceptional importance because it obliterates the lofty message of protection this Court has used to define a public employee's First Amendment rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX -CIRCUIT COURT DECISION

LEXSEE 2004 U.S. APP. LEXIS 25575

STEVEN GRAHAM, DANIEL R. GREIN, and TIMOTHY BAKER, Plaintiffs-Appellants, v. CITY OF MENTOR, RICHARD A. AMIOTT, JULIAN M. SUSO, EDWARD WALSH, and RICHARD HENNING, Defendants-Appellees.

No. 03-3915

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

118 Fed. Appx. 27; 2004 U.S. App. LEXIS 25575

November 29, 2004, Filed

NOTICE: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff police officers sought review of a decision of the United States District Court for the Northern District of Ohio, which granted summary judgment to defendants, a city, its police chief, its city manager and two city council presidents. The officers filed a claim pursuant to *42 U.S.C.S. § 1983* for violation of their rights under the First and Fourteenth Amendments.

OVERVIEW: The three police officers repeatedly used the media to voice their disapproval of the police chief. The police chief admitted that his decision to recommend the discharge of the officers was based, in part, on the officers' use of the media to intensify department disputes. The officers alleged in their lawsuit that the action was taken against them in retaliation for the exercise of their First Amendment rights, and that the two council presidents had conspired to deprived the officers of their rights. The court found that the officers' speech concerning corruption in the department was protected speech potentially about matters of public concern. Under the balancing analysis, it was clear that the officers' conduct was intended to create division among the police force, and that the officers were using disruptive tactics to support their allegations. The city also presented sufficient evidence to prove that it would have terminated the employment of the two officers in the absence of the protected conduct. The city's police rules were not overly broad. The conspiracy claim was not actionable when there was no evidence that the officers' civil rights had been violated.

OUTCOME: The court affirmed the decision of the district court.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards of Review
Civil Procedure > Summary Judgment > Summary Judgment Standard
[HN1] The United States Court of Appeals for the Sixth Circuit reviews a district court's grant of summary judgment de novo. Summary judgment is appropriate when there is no genuine issue as to any material fact, and the non-moving party is entitled to judgment as a matter of law. All evidence must be viewed in the light most favorable to the non-moving party.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > Coverage
Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech
[HN2] A government employer cannot retaliate against a public employee for exercising the right to speak freely. However, the public employee's right to speak is not limitless. To establish a prima facie case of retaliation under *42 U.S.C.S. § 1983,* the employee must show that: (1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a substantial or motivating factor in the adverse action. If the employee can make this showing, the burden shifts to the employer to prove, by a preponderance, that it would have taken the same action even in the absence of the protected conduct. To state a claim, the plaintiff must show that his speech is protected under the First Amendment. If not, no further inquiry is necessary. To prove that the speech is protected, employees must satisfy a two-prong test: 1) that the speech involved matters of public concern or interest, and 2) that the employees' interest in the speech outweighed the employer's

interest in promoting the efficiency of the public services it performs through its employees.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech

[HN3] Protected speech by a public employee must address a matter of public concern, i.e., relate to any matter of political, social, or other concern to the community. Matters of public concern are those about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of the government. To determine whether speech relates to a matter of public concern, the content, form, and context of a given statement, as revealed by the whole record must be examined. Furthermore, although the motivations of the speaker are relevant, they are not determinative.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech

[HN4] Speech that exposes corruption is a matter of public concern, thus, a police officers' speech on corruption is protected.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech

[HN5] Employees do not enjoy a limitless right to free speech; instead, the employees' right must be balanced against the employer's right to maintain a productive workplace. This balancing is a question of law and is a fact-specific inquiry. Employees have an interest in uncovering potential corruption, but the city has an interest in maintaining an effective police force, free from internal division.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech

[HN6] When police officers' speech is reasonably calculated to create division, the speech may be unprotected because of its potential negative effect on the public. Furthermore, a police chief cannot be expected to tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships, and a city cannot be expected to tolerate officers who use both the media and disruptive behavior in the workplace to influence personnel changes.

Constitutional Law > Fundamental Freedoms > Freedom of Speech > Public Employees' Speech
Constitutional Law > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
[HN7] To sustain a facial challenge to a city's rules, the city's police officers must prove that the rules are "substantially" overbroad. Although the government may place greater restrictions on the speech of employees than on the speech of the public at large, it must arrive at a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and in the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.

Constitutional Law > Civil Rights Enforcement > Immunity > Local Governments
[HN8] To state a claim under Monell, the officers must show that the city had an "official policy" or "custom" that violated the officers' civil rights.

Constitutional Law > Civil Rights Enforcement > Civil Rights Act of 1871 > Conspiracy
[HN9] A civil conspiracy is an agreement between two or more persons to injure another by unlawful action.

COUNSEL: For STEVEN GRAHAM, Plaintiff -- Appellant: Kenneth D. Myers, Cleveland, OH.

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For TIMOTHY BAKER, Plaintiff -- Appellant: Kenneth D. Myers, Cleveland, OH.

For CITY OF MENTOR, et al., Defendant -- Appellee: John T. McLandrich, Paul J. Cristallo, Mazanec, Raskin & Ryder, Cleveland, OH.

JUDGES: Before: SILER, BATCHELDER, and ROGERS, Circuit Judges.

OPINIONBY: SILER

OPINION:

[*28] **SILER, Circuit Judge.** Plaintiffs Steven Graham, Daniel Grein, and Timothy Baker appeal the grant of summary judgment in favor of the City of Mentor ("Mentor"), its police chief, its city manager and one current and one former city council president on Plaintiffs' claim, brought pursuant to *42 U.S.C. § 1983*, [**2] for violation of their rights under the *First* and *Fourteenth Amendments*. The Plaintiffs argue that: 1) they were discharged in retaliation for exercising their *First Amendment* rights; 2) the Mentor police rules are an unconstitutional, prior restraint on speech; and 3) the police chief and city manager conspired to deprive the Plaintiffs of their civil rights. For the reasons stated below, we **AFFIRM**.

BACKGROUND

Graham, Grein, and Baker were police officers for the City of Mentor and active officers in the police union. While employed, they repeatedly used the media to voice their

disapproval of Richard Amiott, the Mentor Police Chief. Amiott's decision to recommend the discharge of the officers was based, in part, on the officers' use of the media to intensify department disputes.

The officers spoke to the media on the institution of police officer "performance standards" or "ticket quotas," as well as on issues of hazing within the police force. They alerted the press to actions of Chief Amiott that they viewed as misconduct, including "ticket fixing" practices, improper logging and taking of compensatory [*29] time, and improper claims that the chief had qualified on the [**3] shooting range. Additionally, while under internal investigations, Graham and Grein both conducted interviews with the press concerning the merits of the allegations against them.

The officers also allegedly harassed a local bar owner who would not support the police union. They allegedly forced a security guard to send a letter critical of Amiott to the local newspaper. They inappropriately obtained documents concerning "voided" tickets and Amiott's shooting records. Each time the officers took an issue to the press, they did so immediately, before Mentor could investigate the allegations.

Police Chief Amiott recommended that the Plaintiffs be discharged; pursuant to the terms of the collective bargaining agreement, the Plaintiffs appealed that recommendation to City Manager Suso, who concurred. Each discharge proceeded to arbitration, and after extensive evidentiary hearings, the arbitrators determined that Graham and Grein should be discharged, but that Baker had engaged in only minor wrongdoing and should be reinstated with pack pay. Mentor complied with the arbitrators' determinations. Graham, Grein and Baker then brought this action against Mentor, Amiott, Suso and City Council [**4] Presidents Walsh and Henning, claiming -- among other things -- that they had been discharged in retaliation for exercising their

First Amendment rights, that the sections of Mentor's police rules upon which Plaintiffs' discharge had been based violated the *First Amendment*, and that Amiott and Suso had conspired to deprive the Plaintiffs of their civil rights.

ANALYSIS

[HN1] We review the district court's grant of summary judgment *de novo. Farhat v. Jopke, 370 F.3d 580, 587 (6th Cir. 2004)*. Summary judgment is appropriate when "there is no genuine issue as to any material fact," and the non-moving party is entitled to "judgment as a matter of law." *Id.*; *see also Fed. R. Civ. P. 56(c)*. All evidence must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co, v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

***First Amendment* Retaliation**

[HN2] A government employer cannot retaliate against a public employee for exercising the right to speak freely. However, the public employee's right to speak is not limitless. To establish a prima facie case of retaliation under *42 U.S.C. § 1983*, [**5] the employee must show that: "(1) he was engaged in a constitutionally protected activity; (2) he was subjected to adverse action or deprived of some benefit; and (3) the protected speech was a substantial' or motivating factor' in the adverse action." *Leary v. Daeschner, 349 F.3d 888, 897 (6th Cir. 2003)*. If the employee can make this showing, the burden shifts to the employer to prove, by a preponderance, that "it would have taken the same action even in the absence of the protected conduct." *Jackson v. Leighton, 168 F.3d 903, 909 (6th Cir. 1999)* (citing *Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977))*.

To state a claim, the Plaintiff must show that his speech is protected under the *First Amendment*. If not, "no further inquiry is necessary." *Banks v. Wolfe County Bd, of Educ., 330 F.3d 888, 892-93 (6th Cir. 2003)*. To prove that the

speech is protected, employees must satisfy a two-prong test: 1) that the speech involved "matters of public concern or interest," *Cockrel v. Shelby County Sch. Dist., 270 F.3d 1036, 1048 (6th Cir. 2001)*; and 2) that the employees' interest in the speech [**6] outweighed the employer's interest in "promoting the efficiency of the public services [*30] it performs through its employees." *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).*

1. Public Concern

[HN3] Protected speech must address a matter of public concern, i.e., relate to any "matter of political, social, or other concern to the community." *Connick v. Myers, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).* Matters of public concern are those about which "information is needed or appropriate to enable the members of society to make informed decisions about the operation of the government." *Banks, 330 F.3d at 893.* To determine whether speech relates to a matter of public concern, the "content, form, and context of a given statement, as revealed by the whole record" must be examined. *Connick, 461 U.S. at 147-48.* Furthermore, although the motivations of the speaker are relevant, they are not determinative. *Taylor v. Keith, 338 F.3d 639, 645 (6th Cir. 2003).*

[HN4] Speech that exposes corruption is a matter of public concern. *Solomon v. Royal Oak Township, 842 F.2d 862, 865-66 (6th Cir. 1988)*; [**7] thus, the officers' speech on corruption is protected. The officers claimed that Amiott "fixed" parking tickets and helped friends receive lower fines for moving violations. They also claimed that Amiott received an undeserved bonus, and that he was improperly taking compensatory time. Although not every issue involving money is a public concern, *see Albert v. Mitchell, 42 Fed. Appx. 691, 2002 WL 1628241, at *3 (6th Cir. 2002)*(overtime not public concern), these allegations rise to this higher level. The officers also allege that Amiott was

unqualified to carry a weapon, potentially placing the public in danger. Furthermore, the issue of "ticket quotas" may be an issue of public concern, especially if innocent drivers are cited so an officer can meet a quota. *See, e.g., Ruhlman v. Hankinson, 461 F. Supp. 145, 148 (W.D. Pa. 1978)*. Because the officers spoke on a matter of public concern, the speech must next be weighed under the *Pickering* balancing test.

2. *Pickering* Balancing

[HN5] Employees do not enjoy a limitless right to free speech; instead, the employees' right must be balanced against the employer's right to maintain a productive [**8] workplace. *Pickering, 391 U.S. at 568*. This balancing is a question of law and is a fact-specific inquiry. *See Williams v. Kentucky, 24 F.3d 1526, 1537 (6th Cir. 1994)*. Employees have an interest in uncovering potential corruption, but the city has an interest in maintaining an effective police force, free from internal division. *See Brown v. City of Trenton, 867 F.2d 318, 322-23 (6th Cir. 1989)* (dicta).

[HN6] When police officers' speech is "reasonably calculated to create division," the speech may be unprotected because of its potential negative effect on the public. *Id. at 322*. Furthermore, a police chief cannot be expected to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." *id. at 323* (quoting *Connick, 461 U.S. at 154*), and a city cannot be expected to tolerate officers who use both the media and disruptive behavior in the workplace to influence personnel changes. *McMurphy v. City of Flushing, 802 F.2d 191, 198 (6th Cir. 1986)*.

Graham, Grein, and Baker clearly intended to create [**9] division among the officers. The news articles and media coverage forced other officers to choose between the Plaintiffs and their chief. The Plaintiffs created a "you are either for us or against us" atmosphere within the station house, and Amiott cannot be expected to tolerate such disruptive behavior. A [*31] police chief needs authority

over and loyalty from his subordinates. The officers claim Amiott should have expected disagreement with them because they were union leaders; however, he could not have been expected to tolerate a media campaign asking for his resignation. Further, the record suggests that the officers used disruptive tactics to obtain the documents supporting their allegations. For these reasons, although the officers spoke on a matter of public concern, *Pickering* balancing weighs in favor of Mentor, and we affirm the judgment of the district court. Although the Plaintiffs' claims do not survive *Pickering* balancing, Mentor presented sufficient evidence to prove that the city would have terminated the employment of Graham and Grein in the absence of any protected conduct. *See Mt. Healthy City Bd. of Educ., 429 U.S. at 287*; *see also Cockrel, 270 F.3d at 1056.* [**10] Because Mentor would have the burden of proving this element at trial, it must prove that "every reasonable juror would conclude that the defendants have met their burden" at the summary judgment stage. *Cockrel, 270 F.3d at 1057.* With respect to Graham and Grein, Mentor has met this burden. These officers were terminated following arbitrations in which the arbitrators determined that misconduct warranted their dismissal. While arbitrators' decisions do not have claim-preclusive effect on constitutional claims pursued under *§ 1983*, *see McDonald v. City of West Branch, 466 U.S. 284, 290, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984)*, the evidence supporting the arbitrators' decisions here is sufficient to show that non-speech reasons motivated Mentor.

Constitutionality of Mentor Police Rules

The officers claim that the Mentor police rules are unconstitutional both facially and as applied. The claim that the rules are unconstitutional as applied to the officers fails as a matter of law because by failing to prove their *§ 1983* claim, their constitutional rights were not violated. [HN7] To sustain a facial challenge, the officers must prove that the

rules are "substantially" overbroad. [**11] *Brown, 867 F.2d at 322.* Although the government may place greater restrictions on the speech of employees than on the speech of the public at large, it must "arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and in the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *United States v. National Treasury Employees Union, 513 U.S. 454, 465-66, 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995).*

The officers challenge six rules: "Criticism," "Unbecoming Conduct," "Insubordination," "Persons Authorized to Make News Releases," "Public Information Officer Kept Informed," and "Criminal Investigations-News Releases." The rule on "Criticism" is not overbroad because it simply codifies categories of unprotected speech. The rule on "Unbecoming Conduct" is also constitutional because it contains guidelines, unlike the similarly titled rule in *Bence v. Breier, 501 F.2d 1185, 1190 (7th Cir. 1974).* The rule on "Insubordination" is not overbroad because it only requires officers to obey "lawful order[s]." The final three rules are not overbroad because [**12] they are ministerial, narrowly drawn, and not directly related to the content of speech.

***Section 1983 Monell* Claim**

The officers claim that the City of Mentor should be held liable under *Monell v. Dep't of Soc. Servs., 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1977).* [HN8] To state a claim under *Monell*, the officers must show that Mentor had an "official policy" or "custom" that violated the officers civil rights. *See Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81,* [*32] *89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986).* However, because the officers were not deprived of their civil rights, i.e., they did not prove that they suffered *First Amendment* retaliation, Mentor cannot be held liable under *Monell.*

Conspiracy to Deprive Civil Rights

The officers claim that Amiott and Suso conspired to deprive them of their civil rights by discharging them in retaliation for their exercise of their *First Amendment* rights. [HN9] A civil conspiracy is "an agreement between two or more persons to injure another by unlawful action." *Farhat v. Jopke, 370 F.3d 580, 599 (6th Cir. 2004)*. Because the officers failed to provide evidence sufficient to withstand summary judgment on their retaliation [**13] claim, they cannot prevail on their conspiracy claim.

AFFIRMED.

APPENDIX –DISTRICT COURT DECISION

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

Steven Graham, et al.,	) CASE NO. 1:01 CV 1095
	)
Plaintiffs,	)
	)
v.	)JUDGE DONALD C. NUGENT
	)
City of Mentor, et al.,	) ***MEMORANDUM OPINION***
	)
Defendants.	)

This matter is before the Court on the Defendants' Motions for Summary Judgment. Although the arguments and defenses are the same in each instance, Defendants filed separate Motions for Summary Judgment against each of the three Plaintiffs. (See ECF #25 as to Daniel Grein; ECF #26 as to Steven Graham; and ECF #27 as to Timothy Baker). Plaintiffs have filed a combined Brief in Opposition and Defendants have filed a combined Reply Brief. All parties have filed several notebooks of exhibits and supporting material as well as deposition transcripts. Consequently, the record relative to these motions is enormous. Briefing is now complete. A lengthy review of the record and the parties' filings reveals that Defendants' are entitled to summary judgment on Plaintiffs' claims. Accordingly, Defendants Motions for Summary Judgment (ECF #25, #26 and #27) are granted.

PROCEDURAL AND FACTUAL HISTORY

Plaintiffs filed this "First Amendment retaliation-'Whistleblower'" action on May 4, 2001, against Defendants City of Mentor, Mentor Police Chief Richard A. Amiott, Mentor City Manager Julian Suso and former Mentor City Counsel Presidents Edward Walsh and Richard Hennig. Plaintiffs Steven Graham and Daniel R. Grein are former police officers of the City of Mentor and Plaintiff Timothy Baker is currently a Mentor police officer. There is a history of resentment between the Plaintiffs and the Union and Chief Amiott. Some of the conflicts between the parties include:

> * ticket quota or standard: In 1998 the Police Department instituted a production standard involving issuance of traffic tickets. The union considered it a quota and vociferously resisted it. The Union and the Plaintiffs complained about the quota to the State Employment Relations Board and were often quoted in the press regarding their objections to the quota. The "production standard" was ultimately rescinded.
>
> *No confidence vote: In June,1999, the Union took a no confidence with respect to Chief Amiott. That vote was reported in the news media.
>
> *Lt. Staton demotion: In 1998, the Police Department investigated Lieutenant Leroy Staton for his role in an of duty activity involving burning arms with a cigarette to demonstrate toughness. Ultimately, the department decided to demote Lt. Staton to Patrol Officer. Rather than accept the demotion, Lt. Staton retired. Lt. Staton had been very active in the Union and many officers, including Plaintiffs, expressed their opinion in the media that the Chief was trying to

"bust the union" and was selectively disciplining union activists.

*SWAT Hazing complaint: In July, 1999, Officer Tim Allen filed an internal complaint regarding SWAT hazing. He alleged that SWAT trainees were forced to jump in Lake Erie or sing "YMCA" in the nude as part of their initiation. He appeared on local television and was quoted in the newspaper regarding his allegations.

*The Union took out a full page advertisement in the local newspaper calling for Chief Amiott's resignation.

*Compensatory time/open records request: In the course of negotiations in the spring of 1999, the Union negotiating committee found that Chief Amiott and other high-ranking officers had accumulated a great deal of compensatory time, which the Union regarded to be in violation of various ordinances governing compensatory time. A Union request for information was denied by the City and was ultimately heard by the Ohio Supreme Court pursuant to the open records complaint filed by, among others, Plaintiffs Grein and Baker. The Ohio Supreme Court sustained the Union's position and the Chief and other officers abandoned the compensatory time that they had accumulated. The controversy was well publicized and the Plaintiffs were quoted in various publications.

*12 hour work shifts discontinued: In February 2000, the city discontinued 12 hour work shifts which the parties had negotiated and which the union considered to be beneficial. The Union staged a public protest and filed an unfair labor practice

charge with the Ohio State Employment Relations Board.

Overall, the two year period prior to the discharge of Plaintiffs was marked by extraordinary conflict between the Union and the Police Chief. Moreover, it is clear that the Union, and in particular these Plaintiffs, took every opportunity to publicize the Union's side of every issue and controversy and to bring as much public criticism and condemnation upon Chief Amiott as they could manage. During this period the Police Department was investigating the activities of the Plaintiffs. The Plaintiffs became aware of the internal investigations regarding them and were quoted in an article which appeared in the local newspaper on January 16, 2000, opining that they were being targeted for internal investigation by Chief Amiott in retaliation for their union activities and for their attempts to bring Chief Amiott's wrongdoing to the public's attention. Chief Amiott issued Notices of Disciplinary Action to Plaintiffs Graham and Grein on January 25, 2000, and to Mr. Baker on October 19, 2000. The charges against each Plaintiff will be addressed in turn.

A. Plaintiff Graham

Plaintiff Graham was hired as a patrol officer by the City of Mentor in 1989. Mr. Graham was president of the Union. Defendant Chief Amiott issued a Notice of Disciplinary Action to Plaintiff Graham on January 25, 2000, which recommended that Plaintiff Graham be terminated. The disciplinary notice listed the following incidents in support of the termination recommendation:

1) The Spetrino investigation- In the summer of 1998, a Mentor patrolman approached a Mentor business owner, William Spetrino, seeking support for the patrolman's' side of a ticket quota dispute that was ongoing

between Chief Amiott and the Mentor patrolmen. Mr. Spetrino refused to take the patrolmen's' side in the dispute and consequently was harassed by certain members of the police department. The harassment included frequent stops and speeding citations and parking citations for parking behind his business. Mr. Grein radioed a patrolman who had stopped Mr. Spetrino for speeding and told him that there was a no tolerance policy for Mr. Spetrino. Mr. Spetrino filed a complaint with Chief Amiott about the harassment in April, 1999. Thereafter, Mr. Graham visited Mr. Spetrino's business on July 10, 1999, asked him what it would take to make his complaint go away and told him that he had a lot to lose, which Mr. Spetrino interpreted as a threat that he could lose his license or his business. This conduct is alleged to have violated several Mentor Police Department Rules and Regulations including, 2.1-1 "Unbecoming Conduct"; 2.1-8 "Insubordination"; 2.1-10 "Knowledge of Laws and Rules"; and 2.1-35 "Conduct Toward the Public". Moreover, the conduct is alleged to violate Ohio Rev. Code § 124.34-Malfeasance, Dishonesty and Failure of Good Behavior.

2) Ticket Fixing Complaint-In September, 1999, Mr. Grein obtained copies of parking tickets and traffic citations from the Mentor Police Department and Mentor Municipal Court, copied them and gave them to Mr. Graham. Mr. Graham passed them around at a party so that they ended up with Mr. Baker, which allowed Mr. Baker to say that he got the documents from someone else. The tickets were used to file a complaint with the City Manager and the media alleging that Chief Amiott was fixing tickets. This conduct is alleged to have violated Mentor Police Department Rules and Regulations, 2.1-1 "Unbecoming Conduct"; 2.1-8 "Insubordination"; 2.1-10 "Knowledge of Rules and Regulations"; 2.1-14 "Criticism"; 2.1-22 "Security of Departmental Business"; and 2.1-25 "Intervention". The conduct is also alleged to have violated Ohio Rev. Code § 124.34 in that it constituted malfeasance and failure of good

behavior.

3) Ellis Letter-In September, 1999, Mr. Grein told a Mentor Mal security guard, Doug Ellis, that Mr. Baker would bring him something and that Mr. Ellis should do what Mr. Baker told him. Mr. Baker brought Mr. Ellis a typed letter and two pre-addressed, stamped envelopes and instructed him to copy the letter onto two separate pieces of paper, put one in each envelope and mail the letters. The envelopes were addressed to the editor of the News Herald and Mr. Baker at the Union office. On October 5, 1999, the letter to the editor, critical of Chief Amiott and supporting the Union in its dispute with the Chief, appeared in the News Herald. The Disciplinary Notice asserts that Mr. Graham participated in this scheme to get Mr. Ellis to send the letter to the News Herald and states that the conduct violated Mentor Police Department Rules and Regulations, 2.1-1 "Unbecoming Conduct"; 2.1-14 "Insubordination"; and 2.1-14 "Criticism". The conduct is also alleged to have violated Ohio Rev. Code § 124.34 in that it constituted malfeasance and failure of good behavior.

4) Disclosure of Internal Investigation-In January, 2000, Mr. Graham provided information to the news media concerning an ongoing internal investigation concerning himself and other patrol officers which resulted in an article being printed in the News Herald on January 16, 2000, describing the internal investigation. This conduct was alleged to have violated Mentor Police Department Rules and Regulations. 2.1-1 "Unbecoming Conduct"; 2.1-10 "Knowledge of Department Rules and Regulations"; 2.1-14 "Insubordination"; 2.1-14 "Criticism"; 2.122 "Security Departmental Business"; Mentor Police Department General Order 54.1(B) (releasing information concerning an internal investigation to the media without prior approval); and Mentor Police Department General Order 54.1.9(B)(7) (expressed opinion that internal investigation was result of

ulterior or improper motives.). The conduct is also alleged to have violated Ohio Rev. Code § 124.34 in that it constituted malfeasance and failure of good behavior. Pursuant to the procedure set forth in the collective bargaining agreement between the City and the Union, Mr. Graham appealed the recommended discipline to City Manager Suso. Mr. Suso conducted a Step 3 grievance/pre-deprivation hearing on February 10, 2000. Present at that hearing were Mr. Graham, Mr. Grein, Mr. Dan Graybil, Jack Petroneli, an attorney representing Mentor, union officers Paul Szabo and Timothy Baker and attorney Randy Weltman, representing the Union. Mr. Suso asked Mr. Graham if he had any additional facts and/or evidence to demonstrate that the charges were without foundation. Mr. Graham was repeatedly given the opportunity to present new, additional or contradictory information in opposition to the charges filed by Chief Amiott. Mr. Graham declined to comment or offer any information or evidence. Mr. Weltman stated that he believed that there was no just cause to sustain any of the recommended discipline and that the investigations were not fair and impartial. Further, Mr. Weltman stated that the conduct of Mr. Graham was either off-duty or protected union activities and was therefore not subject to disciplinary review. After reviewing the extensive investigation files, Mr. Suso issued a Memorandum on February 29, 2000, concluding that the disciplinary charges and recommendation of Chief Amiott were appropriate and notifying Mr. Graham that termination of his employment would be effective on the date an arbitrator renders a decision in this matter or upon the date that Mr. Graham failed to exhaust any remedies under the collective bargaining agreement.

Mr. Graham submitted the matter to arbitration. The arbitration hearing began on September 6, 2000, and lasted five days. The arbitrator heard the testimony of sixteen witnesses, and reviewed over 146 exhibits and considered

the post-hearing briefs of the parties. Arbitrator Nicholas Duda, Jr. issued his arbitration decision and award on May 28, 2001, finding that the "City had just cause as required by the Labor Agreement to impose 'Discharge-termination of employment' on Grievant. Therefore, the discharge is effective as proposed by the City." (ECF #26, Ex .G, p.1)

Specifically, the Arbitrator determined that the City had established three of the four charges against Graham (Charges 1, 2 and 3 relating to the Spetrino investigation, the ticket fixing issue and the disclosure of internal investigation, respectively) and that the discipline of termination was an appropriate penalty for one or al of the three offenses. The Arbitrator found that Mr. Graham's conduct relative to these charges violated several Mentor Police Department Rules and Regulations including 2.1-1 "Unbecoming Conduct; 2.1-8 "Insubordination"; 2.1-25 "Intervention"; 2.1-35 "Conduct toward the Public"; 2.1-14 "Criticism"; 2.1-22 "Security of Departmental Business"; and General Orders 54.1.5(B) and 54.1.9(B)(7). The Arbitrator rejected the Union's charge that Chief Amiott recommended terminating Mr. Graham in retaliation for his union activity. After a comprehensive review of the investigation files and al of the evidence and testimony offered by al parties, the Arbitrator found that the investigation was even handed and that "the action taken here was not because of what the Union had done in pursuit of wages, hours and working conditions. Grievant was discharged for threatening Spetrino improperly, intervening in and publicizing investigations and participating in improper complaints, all of which were unbecoming conduct which impaired the morale, reputation and efficiency of a great police Department." (ECF #26, Ex.G, p.13).

The Arbitrator also rejected the Union's argument that Mr. Graham's publication of internal investigations (Charge 4) was excused because such expressions constitute

free speech. While police officers or public employees do not lose the right to speak merely because of his or her employment, reasonable limits may be imposed on what the employee may discus publicly. The Arbitrator found that the Mentor Police Department rules and regulations were reasonable and that Mr. Graham's conduct in "criticizing Chief Amiott and condemning his actions on various grounds with the specific purpose of destroying the community support that was so important to successful and efficient police operations" was unbecoming conduct which cannot be tolerated. (Id. at p.13). Finally, the Arbitrator determined that the City's decision not to use progressive discipline before recommending termination for Mr. Graham was not arbitrary, capricious, unreasonable or discriminatory because the Collective Bargaining Agreement did not require progressive discipline and because each of Mr. Graham's three misconducts violated important rules and regulations, and each instance of misconduct, standing alone, constituted just cause for removal. (Id.).

B. Plaintiff Grein

Mr. Grein was hired as a patrol officer on October 7, 1991. Mr. Grein was Secretary of the Union. Chief Amiott issued a Notice of Disciplinary Action to Mr. Grein n January, 2000, asserting five charges and recommending that Mr. Grein be terminated as a patrol officer for the City of Mentor. The five charges were:

1) Spetrino Investigation-In addition to the actions of Mr. Graham with respect to Mentor business owner Spetrino, it was asserted that Mr. Grein advised patrol officers who stopped Mr. Spetrino that there was a no tolerance policy regarding Mr. Spetrino, when, in fact, no such policy regarding Mr. Spetrino existed. This conduct is alleged to have violated several Mentor Police Department Rules and Regulations including, 2.1-1 "Unbecoming Conduct"; 2.1-10

"Knowledge of Department Rules and Regulations"; 2.1-25 "Intervention"; 2.1-26 "Truthfulness"; and 2.1-35 "Conduct Toward the Public". Moreover, the conduct is alleged to violate Ohio Rev. Code § 124.34-Malfeasance, Dishonesty and Failure of Good Behavior. (ECF #25, At.1, Ex.D pp1-2).

2) Range Records Issue-In August, 1999, Mr. Grein was alleged to have improperly obtained records of the Police Department relating to shooting qualifications. He made copies of the records and drafted a letter to the City Manager alleging that Chief Amiott had failed to qualify with his weapon and was in violation of state law and delivered the records and documents to Patrolman Ivanovics who signed the letter to the City Manager as though he were the complaining party. Simultaneously, copies of these documents were sent to the Ohio Peace Officer Training Commission requesting an investigation and to the news media. Given that the complaint was given to the media at the same time as it was given to the City Manager, it is clear that the purpose of the complaint was to embarrass Chief Amiott and the Police Department. The publicity generated by these actions resulted in embarrassment to the City, the Chief and the Police Department and required significant administrative time to demonstrate to the public that the complaint was false and that the Chief was qualified under the law. This conduct is alleged to have violated several Mentor Police Department Rules and Regulations including, 2.1-1 "Unbecoming Conduct"; 2.1-14 "Insubordination"; 2.1-11 "Obedience to Laws and Regulations"; 2.1-14 "Criticism"; 2.1-22 "Security of Departmental Business"; 2.1-41 "Chain of Command"; 2.1-26 "Truthfulness"; 9.75-34 "Reports and Bookings"; 9.75-36 "Processing Property and Evidence"; Mentor Police Department General Order 54.1.5(E) (releasing information concerning an investigation to the media without prior approval); and Mentor Police Department General Order 54.1.9(B)(7) (expressed opinion that internal investigation was result of ulterior or improper

motives.) . Moreover, the conduct is alleged to violate Ohio Rev. Code § 124.34- Malfeasance, Dishonesty and Failure of Good Behavior. (See ECF #25, At.1, Ex.D, pp.3-5).

3) Ellis Letter-this incident has been fully described above in relation to Mr. Graham. In addition to the rules and regulations listed above in part A-3, this conduct on the part of Mr. Grein is asserted to have violated Mentor Police Department Rules and Regulations 2.1-26 "Truthfulness" and 2.1-29 "Abuse of Position".

4) Computer Incident-On August 29, 1999, Mr. Grein entered the dispatch office and attempted to gain entry into the new computer system, knowing that he did not have the appropriate password or clearance to utilize the system. Since Mr. Grein knew that he could not get into the system using his own name, he used Sergeant Bissler's name to gain entrance into the system. Mr. Grein did not know the correct password and so entered the wrong password repeatedly, even though the computer warned him that the system would shut down if he continued to attempt entry without authorization. His repeated entry of wrong passwords caused the computer system at that workstation to shut down. Consequently, the dispatchers could not use that workstation and the Communications Supervisor had to be called at home to come in and re-boot the computer workstation. On that same day, Mr. Grein attempted to gain entry into the computer system at the corrections' officers office and crashed the computer at that workstation. Once again, the Communications Supervisor had to return to re-boot that workstation. In September, 1999, Mr. Grein was overheard by others at a wedding reception laughing about having crashed the workstations and causing the Communication Supervisor to re-boot the two workstations. This conduct is alleged to have violated several Mentor Police Department Rules and Regulations including, 2.1-1 "Unbecoming Conduct"; 2.1-10 "Knowledge of Department Rules and

Regulations"; 2.1-11 "Obedience to Laws and Resolutions"; and 2.1-26 "Truthfulness". Moreover, the conduct is alleged to violate Ohio Rev. Code § 124.34- Malfeasance, Dishonesty and Failure of Good Behavior.

5) Disclosure of Internal Investigation-In January, 2000, Mr. Grein provided information to the news media concerning an ongoing internal investigation concerning himself and other patrol officers, which resulted in an article being printed in the News Herald on January 16, 2000, describing the internal investigation. This conduct was alleged to have violated Mentor Police Department Rules and Regulations, 2.1-1 "Unbecoming Conduct"; 2.1-10 "Knowledge of Department Rules and Regulations"; 2.1-14 "Insubordination"; 2.1-14 "Criticism"; 2.122 "Security Departmental Business"; Mentor Police Department General Order 54.1.5(B) (releasing information concerning an internal investigation to the media without prior approval); and Mentor Police Department General Order 54.1.9(B)(7) (expressed opinion that internal investigation was result of ulterior or improper motives.) . The conduct is also alleged to have violated Ohio Rev. Code § 124.34 in that it constituted malfeasance and failure of good behavior. Further, the conduct is alleged to constitute a violation of Article 27 of the collective Bargaining Agreement titled "Police Professionalism".

Mr. Grein, through the Union, appealed Chief Amiott's recommendation of termination to City Manager Suso. Mr. Suso conducted a grievance/pre-deprivation hearing on February 10, 2000, which was attended by the City's attorney, Mr. Petronelli, Union President Steven Graham, Mr. Graybil, Union Officers Paul Zabo and Timothy Baker and Union attorney Randy Weltman. Mr. Suso repeatedly asked Mr. Grein if he had any evidence or facts to rebut the charges against him. Like Mr. Graham, Mr. Grein refused to comment or provide any defense or excuse.

Mr. Weltman made the same arguments on behalf of Mr. Grein as he made on behalf of Mr. Graham, including the statement that al of the evidence needed to exonerate Mr. Grein (and Mr. Graham) was in the investigative files. After reviewing al of the documents in the investigative files as well as the statements made at the February 10 disciplinary hearing, Mr. Suso concluded that disciplinary charges and proposed termination of Mr. Grein was appropriate. Accordingly, Mr. Suso notified Mr. Grein on February 29, 2000, that termination of his employment would be effective on the date an arbitrator renders a decision on the matter or upon the date that Mr. Grein failed to exhaust any remedies under the Collective Bargaining Agreement.

Mr. Grein appealed Mr. Suso's decision to an arbitrator. The parties agreed on Harry Graham as the Arbitrator and a hearing was held over a four day period. After reading the transcript of the proceedings and reviewing the post hearing briefs submitted by the parties, the Arbitrator issued his opinion rejecting Mr. Grein's arguments that he was disciplined in retaliation for his union activities or for the exercise of his First Amendment speech or association rights. Arbitrator Graham denied Mr. Grein's grievance finding that Mr. Grein's conduct relative to the range records issue, the computer incident, the Ellis letter incident and Mr. Grein's making of derogatory public comments to the media intended to destroy the public respect for the police department al constituted unbecoming conduct in violation of Regulation 2.1.1 and supported the action of the City.(ECF #25, Ex.G at pp.27-40).

C. Plaintiff Baker

Timothy Baker was hired as a patrol officer on April 17, 1995. On October 19, 2000, Chief Amiott issued a Notice of Disciplinary Action to Mr. Baker which recommended that Plaintiff Baker be terminated. The

disciplinary notice listed the following incidents in support of the termination recommendation:

1) Ticket Fixing Complaint-This is the same incident described above in relation to Mr. Graham. Mr. Baker took the improperly obtained parking tickets and traffic citations, along with a complaint that Chief Amiott had violated the law by "fixing the tickets" to City Manager Suso. At the same time the media "appeared" as Mr. Baker was delivering the complaint to the City Manager and Mr. Baker spoke to the press regarding the Chief's alleged illegal activities. Despite the "scandal" that was reported in the media, the City Manager's brief investigation of the complaint found that no laws had been violated and that the complaint was unfounded. Further, it is alleged that during Mr. Baker's Internal Affairs investigation, he failed to answer the questions put to him in an honest, truthful, and full manner and made statements which were contradicted by other witnesses.

2) Ellis Letter-as detailed above, Mr. Baker was accused of helping to coerce an outsider, Mr. Ellis, to submit a letter to the editor that was highly critical of Chief Amiott.

3) Spetrino Investigation- as detailed above, Mr. Baker was accused of conspiring with Mr. Graham and Mr. Grein to harass Mentor business owner Spetrino by ticketing vehicles parked in a shopping center housing Mr. Spetrino's business.

Mr. Baker's conduct in these three incidents was alleged to have violated the following Mentor Police Department Rules and Regulations: 2.1-1 "Unbecoming Conduct"; 2.1-14 "Insubordination"; 2.1-14 "Criticism"; 2.1-22 "Security of Departmental Business"; 2.1-41 "Chain of Command"; 2.1-26 "Truthfulness"; 2.1-29 "Abuse of position"; and Mentor Police Department General Order

54.1.5 (releasing information via a news release). Moreover, the conduct was alleged to violate Ohio Rev. Code § 124.34-Malfeasance, Dishonesty and Failure of Good Behavior.

Through his Union, Mr. Baker appealed the disciplinary notice to City Manager Suso. On November 8, 2000, Mr. Suso upheld Chief Amiott's recommendation to terminate Mr. Baker and informed Mr. Baker that the termination of his employment would be effective on the date an arbitrator renders a decision on the matter or upon the date that Mr. Baker failed to exhaust any remedies under the Collective Bargaining Agreement.

A two day arbitration hearing was held before Arbitrator Harry Graham. After listening to the testimony, reading the transcript and reviewing the post hearing briefs submitted by the parties, the Arbitrator issued an opinion on May 28, 2000, upholding Mr. Baker's grievance and determining that he should be reinstated as a Mentor Patrol Officer with full back pay and benefits. In accordance with the Arbitrator's decision, Mr. Baker was reinstated as a patrol officer.

Specifically, the Arbitrator determined that none of the three incidents asserted against Mr. Baker supported discharge. The allegations relative to the Spetrino incident, as to the involvement of Mr. Baker, were inferential in nature. Moreover, the Arbitrator found that Mr. Baker was acting pursuant to the Traffic Enforcement Policy of the City of Mentor and that al of the tickets issued by Mr. Baker were valid. With respect to the Ellis letter, the Arbitrator found that the testimony of Mr. Ellis was contradictory and inconsistent. Since Mr. Ellis was the accuser of Mr. Baker on this charge and his testimony was "worthless", the charge could not be sustained. Finally, the ticket fixing issue was dismissed as against Mr. Baker because Mr. Baker's account of the manner in which he received the tickets was not

contradicted. Further, Mr. Baker did not contact the press upon filing of his complaint against the Chief and his complaint was properly filed. Although finding in favor of Mr. Baker, Arbitrator Graham determined that anti-unionism was not a factor in Officer Baker's discharge because the charges against him could not properly be considered union activities. (ECF #27, Ex. I at pp. 11-12). Further, the Arbitrator made no finding that the City sought to terminate Mr. Baker in retaliation for the exercise of his First Amendment rights.

On this record, the Plaintiffs assert the following claims in their Complaint:

Count I -Defendants' conduct violated their rights of free speech and association as guaranteed by the First Amendment to the United States Constitution;

Count II -Defendants' conduct in terminating Plaintiffs Graham and Grein and disciplining Mr. Baker constituted retaliation for Plaintiffs' exercise of their First Amendment rights;

Count III -Defendant City of Mentor's actions constitute a violation of § 1983 as set forth in *Model v. Dept. of Social Services of the City of New York,* 436 U.S. 658 (1978);

Count IV -Defendants' actions constituted a conspiracy to deprive Plaintiffs of their civil rights under federal and state law;

Count V -Defendants' actions constitute wrongful discharge in violation of public policy under state law; and

Count VI -Defendants used sections of the Mentor Police Department Rules and Regulations which were unconstitutional on their face to justify the discipline of Plaintiffs and such conduct violated Plaintiffs' First Amendment rights of free speech and association.

These Motions have been fully briefed and are now ready for decision.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catret, 477 U.S. 317, 323 (1986) (citing FED. R. CIV. P. 56(c). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995)(citing *Celotex*, 477 U.S. at 322). Accordingly, "[t]he mere existence of a scintila of evidence in support of the Plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the Plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson,* 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omited). In most civil cases involving summary judgment, the court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to verdict." Id. at 252. However, if the non-moving party faces a heightened burden of proof, such as clear and convincing evidence, it must show that it can produce evidence which, if believed, will meet the higher standard. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 145, 149 (6th Cir. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in

> this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identify the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. Id.

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not al types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testify. Rule 56(e) further requires the party to attach sworn or certified copies to al documents referred to in the affidavit. Furthermore, hearsay evidence cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omited). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's

> consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omited).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." Anderson, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh material evidence to determine the truth of the matter. Id. at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id.

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

DISCUSSION

Plaintiffs allege five claims in their Complaint. Each cause of action will be evaluated in order.

I. Freedom of Association

In Count I, Plaintiffs allege that they are "entitled to associate as they se fit, including membership in, and leadership of, an employees' union, but have been and continue to be prevented from associating as they see fit as a direct result" of the Defendants' conduct. (Complaint, ¶67).

Plaintiffs appear to complain that they are prevented from associating with the Union because they (at least in the case of Mr. Graham and Mr. Grein) are no longer Mentor police officers. However, as Defendants correctly assert, the Defendants have done nothing to prohibit Plaintiffs from gaining membership in the union. The MPA bylaws require that its members be current employees of the Mentor Police Department. This membership requirement was not set by or required by the Defendants. Membership exclusion as a result of an association's own rules does not give rise to a "freedom of association" cause of action. See California Democratic Party v. Jones, 530 U.S. 567, 120 S.Ct. 2402 (2000).

Accordingly, Defendants are entitled to summary judgment on Count I of the Complaint.[1]

[1] *In their response to Defendants' Motions for Summary Judgment, Plaintiffs assert that their First Amendment freedom of association claim is really a claim that they were disciplined in retaliation for their association with the union. Plaintiffs' claims of retaliation for engaging in conduct protected by the First Amendment are addressed in part I of this Memorandum and Opinion. Moreover, it should be noted that the Arbitrators who affirmed the termination of Plaintiffs Graham and Grein determined after extensive testimony and argument that neither Mr. Graham nor Mr. Grein was disciplined in retaliation Similarly, there was no finding by the Arbitrator in Mr. Baker's proceeding that Mr. Baker was disciplined in retaliation for his union activities, despite the fact that the Arbitrator determined that Mr. Baker's conduct did not require the recommended discipline. The Court finds that Arbitrators' decisions were thorough, careful and fully supported by the record before them, and that accordingly, their findings are entitled to significant weight.*

II. First Amendment Retaliation.

In Count I, Plaintiffs contend that the Defendants' conduct in "terminating or otherwise disciplining Plaintiffs, constitutes a violation of Plaintiffs' First Amendment rights, in that such actions were taken in retaliation for Plaintiffs exercising their legitimate and protected First Amendment rights, i.e., exposing governmental corruption through their complaints, grievances and comments in the news media on matters of public concern." (Complaint, ¶¶70-71).

In order to establish a prima facie case of a First Amendment retaliation claim, a public employee must demonstrate evidence sufficient to establish three elements: the Plaintiff engaged in constitutionally protected speech; 2) the Plaintiff was subjected to adverse action or was deprived of some benefit; and 3) the protected speech was a "substantial or a "motivating factor" in the adverse action. Mt Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97S.Ct. 568 (1977). If the Plaintiff makes this showing, the burden then shifts to the defendant to show by a preponderance of the evidence "that it would have taken the same action even in the absence of the protected conduct." Jackson v. Leighton, 168 F.3d 903, 909 (6th Cir.1999) (quotation omited); see also Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568.

Whether a Plaintiff has engaged in protected speech is a question of law for the court. Connick v. Myers, 461 U.S. 138, 148 n. 7, 150 n. 10, 103 S.Ct.1684 (1983). Plaintiff bears the burden proving that his actions were constitutionally protected in this context. Jackson, 168 F.3d at 909.

There is a two part analysis to determine if a public employee has engaged in protected speech. First, the Court must determine whether the speech involves a matter of public concern. *Connick*, 461 U.S. at 146. In addition, the public employee must show that his interest in the particular

expression outweighs the government's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The "public concern" requirement recognizes that governments act as an employer and must fulfill the business and functions that are required of them. Employment issues, including issues that may involve speech or association, can and should be resolved in accordance with employment and labor statutes. Thus, the Supreme Court held that:

> only when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state.

Connick, 461 U.S. at 147. (Citations omited). In reiterating and refining this concept of private concern versus public concern and balancing the government's interest in promoting the efficiency of its operation against the employee's rights of free speech, the Sixth Circuit recently stated:

> In striking the balance, we must 'consider whether an employee's comments meaningfully interfere with the performance of [his] duties, undermine a legitimate goal or mission of the employer, create

disharmony among co-workers, impair discipline by superiors, or destroy the relationship of loyalty and trust required of confidential employees.' Williams v. Kentucky, 24 F.3d 1526, 1536 (6th Cir. 1994). And we must recognize that although the government bears the burden of justifying the adverse employment action, see Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), the government is entitled to greater deference when regulating speech as an employer than when it attempts to regulate the speech of the public at large. See Waters v. Churchill, 511 U.S. 661, 673, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994):

> 'The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.'

Sharp v. Lindsey, 285 F.3d 479, 486 (6th Cir. 2002).

To determine whether a public employee's speech addresses a matter of public concern, a court must examine the content, form and context of a given statement. *Connick*, 461 U.S. at 147- 48. Regardless of whether al of the issues in this case are truly matters of public concern, Plaintiffs have clearly used the media to publicize every issue or complaint that they have ever had with the Administration or Chief Amiott. However, the fact that al of these issues have

been discussed in the media does not necessarily make the issues of "public concern" as that term is defined in Connick.

While the police department operates to protect the public and is a city service, most of the issues raised by Plaintiffs concern internal conflicts between Plaintiffs and/or the Union on one side and Chief Amiott on the other; or the issues were raised by Plaintiffs or the Union to denigrate the Chief.

For instance, the Union was incensed when the Chief changed the ticket production standards for police officers. The Union used the media and every other avenue it could find to get the "ticket quota" rescinded. Despite Plaintiffs' reference to a Pennsylvania decision, it is clear to this Court that the alleged ticket quota issue was not a matter of public concern in this context. Rather, the quota was a standard that Mentor police officers were expected to meet as part of their job performance. While an argument can be made that the public would want to know about such standards, at bottom the standard was a job requirement which became a bone of contention between the Union, including Plaintiffs, and their employer. In any event, none of the Plaintiffs was disciplined or charged with any violation of any rule as a result of any statements made about this issue.

Similarly, publication of the Union's no-confidence vote regarding Chief Amiott and the Union's taking of a full page ad calling for Chief Amiott's resignation concern the Union's dissatisfaction with their boss. While the public may be interested in the conflict between the Chief and the Union, the conflict is essentially employment related. Once again, none of the Plaintiffs was disciplined or charged with any violation of any rule as a result of any statements made about this issue.

Both Mr. Graham and Mr. Baker were charged with violating several MPD rules with respect to their participation in the ticket fixing complaint against Chief Amiott. Mr. Graham is alleged to have passed copies of parking tickets and traffic violations obtained from the Mentor Police Department and from the Mentor Municipal Court around a party to end up with Mr. Baker. Mr. Baker then used the tickets to construct a complaint against Chief Amiott for "fixing tickets" which was filed simultaneously with the City Manager and the media. Plaintiffs' complaint that the Chief was fixing tickets can more properly be construed as an allegation of wrongdoing or corruption on the part of a public official which may be a matter of public concern under *Connick*. However, the form and context of the complaint in this case diminishes the level of public concern because the complaint was reported to the media before the City could investigate the complaint and because the allegations were made during what can only be described as an ongoing campaign by the Union, and these Plaintiffs in particular, to oust Chief Amiott.

Plaintiffs' argue that their motives in finding, pursuing and publicizing these accusations against Chief Amiott should not be considered in the determination of whether the statements are of "public concern" under Connick. Plaintiffs' motivation, however, may be helpful in determining public concern or in assessing the balance between the Plaintiff's interest in his speech and the employer's interest in maintaining a smoothly functioning workplace. See Pool v. Vanrheen, 297 F.3d 899 (9th Cir. 2002) (speaker's motivation may be helpful in determining public concern.); Lytle v. City of Haysvile, 138 F.3d 857 (10th Cir.1998) (police officer's failure to pursue allegations of police wrongdoing internally indicated that his speech was unnecessarily disruptive and diminished the weight afforded his interest in the expression vis-à-vis the employer's interest for purposes of the officer's retaliatory discharge claim).

Even a brief review of the hundreds of newspaper articles submitted by the Plaintiffs, the overwhelming majority of which are extremely critical of Chief Amiott, leads not to a conclusion that these issues were of public concern, but rather that the Plaintiffs were using the media to further their own agenda which was to cause the removal of the Chief. At some point then, the sheer number of articles and public complaints generated by the Union and the Plaintiffs begins to support the Defendants' position that this speech of alleged public concern was just a means to attain Plaintiffs' ultimate goal- the removal of the Chief through constant controversy and the disruption of the Department.

Mr. Grein was charged with violating several MPD rules when he obtained range records which he would not ordinarily have access to and used those records to request an investigation into the Chief's weapons qualification and notified the media that the Chief was not weapon qualified. After some investigation, it appears that Mr. Grein's charges against the Chief were unfounded. Again, while the weapons qualification of the Chief may be of interest to the public, especially if he was receiving extra pay for a qualification that he did not have, the form and context of the speech detract from its level of public concern.

Mr. Graham and Mr. Grein were also charged with disclosing internal investigations in violation with MPD rules when they informed the media that they were the subjects of internal investigations by the MPD. The fact that Plaintiffs were being investigated by the MPD is not a matter of public concern. The investigation of two employees regarding several alleged violations of MPD rules and regulations is an employment matter of interest primarily to the Plaintiffs.

Thus, while some of the issues raised by Plaintiffs (or the Union) in the media may, on the surface, seem to be of

public concern-Chief's weapons qualification, Chief's ticket fixing, Chief's ticket quotas, Chief's allowing SWAT hazing, Chief's comp time issue, Chief's retaliation and " violations of law"-the context and form of the complaints diminishes the level of public concern. However, even if the context and form of the speech is ignored and the Court accepts that the speech is of "public concern", Plaintiffs still have not demonstrated the second element-that Plaintiffs' interest in the particular expressions outweighs the government's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, supra, 391 U.S. at 568.

Plaintiffs contend that Defendants have not submitted evidence that the speech at issue damaged the Department or caused harm to the City. Controversy does not equal harm the Plaintiffs contend. (ECF #46, p.10). In rebuttal the Defendants refer to the testimony of Detective Edward Zigman, a thirteen year veteran of the MPD, who testified at Mr. Grein's arbitration. Mr. Zigman testified that all of the negative publicity made the Department look bad and the police officers look like a bunch of fools. Most importantly, he felt that the articles and media attention divided the department. (See testimony cited at ECF #51, At.1 at pp. 20-21). Clearly, the news coverage shows that there was enormous conflict in the MPD and between some of the police officers and Chief Amiott. It seems obvious that Plaintiffs' use of the news media to publicize their complaints with Chief Amiott could only make a bad situation worse. The Defendants have a significant interest in maintaining a cohesive and smoothly functioning Police Department. There is sufficient evidence in the record showing that the public comments made by Plaintiffs about those issues on which they were disciplined "meaningfully interfer[ed] with the performance of [their] duties, undermine[d] a legitimate goal or mission of the [MPD}, create[d] disharmony among co-workers, impair[ed]

discipline by superiors, or destroy[ed] the relationship of loyalty and trust required of confidential employees." See Sharp, supra, 285 F.3d at 486. Accordingly, the Court finds that Plaintiffs have not demonstrated the first element of their retaliation claim-that they engaged in constitutionally protected speech.

Even if Plaintiffs had demonstrated the first element of their retaliation claim, they have not demonstrated the third element-that the protected speech was a "substantial or a "motivating factor" in the adverse action taken against Plaintiffs.[2] The Defendants assert that the Plaintiffs were disciplined for

[2]*While there has been some discussion that the Defendants did not cause an adverse action to the Plaintiffs since the collective bargaining agreement gives the ultimate decision on termination to an arbitrator, it seems clear that the imposition of an unpaid suspension and the issuance of a disciplinary notice against the Plaintiffs would be sufficient to constitute an adverse action. On the other hand, Mr. Baker, at least, has ultimately been compensated for all lost wages, benefits and seniority that he may have lost as a result of the disciplinary charges brought against him. Accordingly, the Court finds that Mr. Baker has not satisfied the second element of his retaliation claim.*

the reasons set forth in their notices of disciplinary action. Many of the conflicts reported in the media are not included in the disciplinary notices. There is no evidence, short of speculation based upon publicized conflicts between the Union and Chief Amiott, that Plaintiffs were disciplined because of their Union activity or any speech attributed to them in the media. According to the disciplinary notices served on each Plaintiff, Plaintiff Graham was disciplined for his actions relative to the Spetrino matter, the ticket-fixing issue, the Scotty Ellis letter to the editor, and for speaking to the media about an ongoing internal investigation. Plaintiff

Grein was disciplined for his conduct relative to the Spetrino matter, the Scotty Ellis letter to the editor, the range record matter, the computer crashing incidents and his disclosure to the media of an ongoing, internal investigation. Plaintiff Baker was disciplined for his involvement in the ticket fixing issue, the Scotty Ellis letter to the editor and the Spetrino matter. In the cases of Mr. Graham and Mr. Grein, their arbitrators determined that their egregious conduct-not their speech or any union activities-supported the recommended discipline of termination. In both cases the arbitrators found that the charges against Mr. Graham and Mr. Grein were not the result of any anti-union bias or based on retaliation for Plaintiffs' speech. There has been no evidence that the arbitrators' findings were not supported by the evidence or were in any way arbitrary or capricious. Further, there has been no evidence that the arbitrators themselves were biased against Plaintiffs or had any motive to retaliate against Plaintiffs. The fact that neither the Chief of Police or the City Manager could terminate a police officer is a huge concession to the Union. The corresponding arbitration of any recommended discharge should eliminate any unjust or unfair discipline, especially any discipline meted out in retaliation for an officer's union activity. Indeed as noted above, Mr. Baker's arbitrator did not find enough evidence to support any discipline against Mr. Baker. On the other hand, the Arbitrator determined that the charges against Mr. Baker were not the result of anti-union animus or in any way retaliatory for any speech.[3]

[3]*The collective bargaining agreement between the parties requires final, binding arbitration of grievances like the ones at issue here. Accordingly, this Court will not review the Arbitrators' opinions as on appeal. Nevertheless, the findings of the Arbitrators is instructive and persuasive. As Defendants correctly assert, the Plaintiffs may not make an end run around their agreement to be bound by binding arbitration. The Court's review in this instance is limited to whether Plaintiffs have demonstrated any*

Constitutional violations which were not or could not be fully addressed in arbitration.

Plaintiffs assert that in addition to the circumstantial evidence (that Plaintiffs were disciplined following intense reporting of various conflicts between the Union and the Chief), there is direct evidence of Defendants' retaliatory motive. Specifically, Plaintiffs refer to the deposition testimony of Defendant Edward Walsh. The Court has carefully read the entire transcript of Mr. Walsh's deposition. Mr. Walsh has been a Mentor City Councilman for 27 years and served as President of the Council for two terms-1997-1998 and 2000-2001. (ECF #33, pp.36, 5). Plaintiffs assert that Mr. Walsh's statements indicate that the decision makers and those who had influence over them, such as Chief Amiott, had an anti-union animus and that Defendants were terminated because the union became too strong. (ECF #46 at p.15).

Mr. Walsh, who stated that he was a former union man, was sympathetic to the Plaintiffs and wanted to broker a resolution of the matters to avoid termination of the Plaintiffs. To that end Mr. Walsh suggested that the Plaintiffs write a letter of apology, take a 120 day suspension and avoid union office for three years. (ECF #33, pp.30-32). Mr. Walsh made clear that this proposal was his idea and was not suggested by Chief Amiott, Mr. Suso or any other Defendant or Mentor official. Mr. Walsh apparently had several conversations with Plaintiff Grein during the period after he was served with his disciplinary notice through the date of his arbitration. Unknown to Mr. Walsh, Mr. Grein secretly taped those conversations. At his deposition Plaintiffs' counsel questioned Mr. Walsh about the conversations as set forth in transcripts or partial transcripts of those conversations. Specifically, Plaintiffs assert that Mr. Walsh said that Plaintiffs were terminated because the union became too strong. Mr. Walsh's testimony does not support

that assertion. While discussing Mr. Walsh's 3 point settlement proposal, Mr. Grein said that they (presumably the City) did not want the Plaintiffs to be union officers for three years because they had become too good. The transcript of the tape indicated that Mr. Walsh agreed saying "That's right. Too good, too strong." (ECF #33, pp90-91). That statement cannot reasonably be understood to relate to any underlying reason why Plaintiffs were recommended for termination. The conversation concerned one element of a settlement proposed by Mr. Walsh. There is no evidence that the settlement proposal was ever seriously discussed by or approved by the other Defendants or that the City or Mr. Suso desired or required a 3 year moratorium on Plaintiffs being union officers. In response to further questions regarding the "too strong" comment, Mr. Walsh stated that the administration was not "orientative[sic] to the union". (Id. at p. 92). By that Mr. Walsh explained that he believed that the administration was not interested in the unions, not that they didn't want a stronger union but that they didn't care about the union. (Id. at pp. 92-93). Mr. Walsh's statements, at best reflect his opinion regarding the administration's view of the union, and in any event the statements do not demonstrate an anti-union animus.

With respect to Chief Amiott, Mr. Walsh opined that Chief Amiott may have been upset or vindictive because of the personal and professional attacks against him. (Id. at pp. 43-44; 79-80). While Mr. Walsh understood why Chief Amiott may have been angry or vindictive, since Mr. Walsh would have felt that way in the same circumstances, he stated that he didn't know how Chief Amiott was feeling towards Plaintiffs. (Id.). Accordingly, the Court finds that Mr. Walsh's testimony does not demonstrate that Defendants' recommended the termination of the three Plaintiffs in retaliation for their protected speech or for their union association. Moreover, these charges against the Plaintiffs were investigated and recommended by Internal

Affairs, not any of the Defendants currently before the Court. In accordance with department procedure, the results of the investigations of the Plaintiffs and the recommendations relative to each Plaintiff were presented to Chief Amiott and adopted by Chief Amiott. Defendants assert that Chief Amiott was duty bound to act upon internal affair's findings that his officers engaged in gross misconduct. Further, in accordance with the labor agreement the internal affairs investigation and the Chief's recommendations regarding each Plaintiff was forwarded to the City Manager for review. Each Plaintiff was given ample time and opportunity to present evidence rebutting the charges against him. Only Officer Baker presented evidence to rebut the charges. There has been no evidence to suggest that Defendants' actions were taken for any reason other that to address the disciplinary problems associated with Plaintiffs' conduct. Further, al actions were taken in accordance with the collective bargaining agreement.

Accordingly, the Court finds that since Plaintiffs have not established a prima facie case of retaliation, Defendants are entitled to summary judgment on that claim.

II. Monel Claim

In Count III of their Complaint, Plaintiffs allege that "the actions of the City of Mentor, in disciplining and terminating Plaintiffs, constitute a violation of the defendant's obligations under *Monel v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), in that the city has a policy and practice of violating employees' constitutional and statutory rights." (ECF # 1 at ¶73).

A local government is liable as an entity under § 1983 "only when the government itself has committed the constitutional violation, not when the violation was

committed by its employees." *Feliciano v. City of Cleveland*, 988 F.2d 649, 653 (6th Cir. 1993) citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79, 106 S.Ct. 1292, 1297-98 (1985). "Congress did not intend municipalities to be held liable [under §1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monel*, supra, 436 U.S. at 691. Thus, it is only " when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." Id. at 694. In other words, the official policy must be the "moving force of the constitutional violation." See id. A municipality is not liable under § 1983 for injuries inflicted solely by its employees or agents, and the doctrine of respondent superior is inapplicable to §1983 actions. Monel, 436 U.S. at 694-95. Thus, if a Plaintiff has supported his constitutional claim with the required evidence, he must also offer evidence that the municipality caused his constitutional injury.

In this case the Court has already determined that Plaintiffs have not supported their constitutional claim of retaliation against anybody, including the City of Mentor. Thus, the City of Mentor cannot be liable under Monel.

IV. Conspiracy Claim

In Count IV of their Complaint, Plaintiffs allege that the actions of defendants "in terminating and otherwise disciplining Plaintiffs for the exercise of their constitutionally protected rights to free speech, free expression and free association, constitute a conspiracy to deprive Plaintiffs of their civil rights under federal and state law." (ECF #1 at ¶76). In as much as the Court has determined that Plaintiffs have failed to establish the underlying unlawful act, in this case an alleged constitutional violation, i.e., that they were not disciplined or discharged in

retaliation for their exercise of their protected rights to free speech or association, there is no basis for conspiracy claim.

V. Ohio Public Policy Claim

In Count V of their Complaint, Plaintiffs allege that "the actions of defendants, in terminating and otherwise disciplining Plaintiffs in violation of Plaintiffs' constitutionally protected rights of free speech, free expression and free association, constitute wrongful discharge in violation of public policy under state law." (ECF #1 at ¶79). Since the Court has determined that Defendants' actions did not violate Plaintiffs' Constitutional rights, there is no basis for Plaintiffs' public policy claim and Defendants are entitled to summary judgment on this claim.

VI. Constitutionality of MPD Rules and Regulations

Plaintiffs contend in Count VI of their Complaint that Defendants "used sections of the MPD Rules and Regulations that are unconstitutional on their face and as applied to justify the discipline of Plaintiffs and therefore, violated Plaintiffs' rights of free speech and free association." (ECF #1 at ¶82).

The Court has already determined that the application of the MPD rules and regulations at issue did not violate Plaintiffs' rights of free speech and association in this case. Accordingly, Defendants are entitled to summary judgment on this claim as it relates to Plaintiff's "as applied" challenge.

The only remaining question is whether the MPD rules and regulations at issue herein are unconstitutional on their face. As discussed in earlier sections of this

Memorandum Opinion, the Supreme Court has recognized that public employers may impose restraints on the job-related speech of public employees that would be unconstitutional if applied to the public at large. See United States v. U.S National Treasury Employees Union, 115 S.Ct. 1003, 1012 (1995). In NTEU, the Supreme Court applied a Pickering type balancing test to determine if the Government would be permitted to maintain a statutory restriction on employee speech. The law at issue in NTEU was a subsection of the Ethics in Government Act which prohibited the receipt of honoraria by government employees. While the statute in question did not specifically prohibit speech or regulate the content of speech, it placed a significant burden on speech because compensation provides an important incentive toward expression. The Court noted that because the Ethics Act did not concern a post hoc analysis of an employee's speech and its impact on that employee's public responsibilities as in Pickering, but rather was a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," the Government's burden was heavy. Id. at 1013. As such the Government was required to show evidence that the statute was designed to protect against specific harm-i.e. some kind of nexus between the statute and the harm to be avoided as well as evidence that the articulated harms to be prevented are real and not speculative.

The Court concluded that the honoraria ban violated the First Amendment because "the speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities." Id. at 1018.

Plaintiffs claim that as in NTEU, the MPD rules and regulations at issue here constitute a prior restraint prohibiting a large amount of protected speech by a large number of potential speakers, thus requiring the City to meet

a heavier burden to justify the restrictions. Courts use a *Pickering*/NTEU type balancing test to determine whether government rules or regulations governing or impacting public employees' expression are unconstitutional. See *Harman v. City of New York*, 140 F.3d 111 (2d Cir. 1998); Unlike NTEU, the controversy in this case arises under a post hoc application of the rules to Plaintiffs. Even if the challenged rules had not been applied to Plaintiffs, but were challenged solely on their face, the rules apply only to Mentor Police Department employees-not the broad categories of people affected by the Congressional statute in NTEU. Moreover, the MPD rules do not apply to all speech-the prohibitions apply only to expression related to the MPD. More significantly, al but one of the rules or regulations place little or no burden on speech. Plaintiffs assert facial challenges to the following MPD rules and regulations:

(1) Mentor Police Department Rules and Regulations 2.1-14: "Criticism" Members and employees shall not publicly criticize or ridicule the department, its policies or other employees by talking, writing or expressing in any other manner, where such talking, writing or other expression:

-is defamatory

-is obscene

-is unlawful

-tends to impair the operation of the department by interfering with its efficiency; interfering with the ability of supervisors to maintai:: discipline; or having been made with reckless disregard for truth or falsity.

(2) Mentor Police Department Rules and Regulations 2.1-1: "Unbecoming Conduct" Officers shall conduct themselves at al times, both on and of duty, in such manner as to reflect most favorably on the department. Conduct unbecoming an officer shall include that which brings the department into disrepute or reflects discredit upon the

officer as a member of the department or that which impairs the operation or efficiency of the department or officer.

(3) Mentor Police Department Rules and Regulations 2.1-8: "Insubordination" Failure or deliberate refusal of any member or employee to obey a lawful order given by a superior officer shall be insubordination.

(4) Mentor Police Department General Order 54.1.5(B): "Persons Authorized to Make News Releases"
(B) The P.I.O. [Public Information Officer] is available during the early hours of the day watch, Monday through Friday, for release of information from the previous day's activities. In the absence of the P.I.O. supervisors of the police department should answer questions about events that are occurring at that time. (See G.O. 54.1.10)

G.O. 54.1.10 "Public Information Officer Kept Informed"
A. It is imperative that the P.I.O. be kept appraised of any newsworthy or unusual incidents which involve the department. Such information should be conveyed to the P.I.O. in a timely manner. All members of the department must keep the P.I.O. appraised and updated so that a (sic) intelligent and appropriate response can be made to media inquiries.

(5) Mentor Police Department General Order 54.1.9(B)(7): "Criminal Investigations-News Releases"
(B) Members of the department authorized to release information to the media will be guided in the release of information by G.O. 54.1.5 and by the specific guidelines that follow:
(7) No opinion concerning the merits of the case or quality of the evidence will be expressed.

On its face, Mentor Police Department Rules and Regulations 2.1-14: "Criticism" prohibits employees from

publicly criticizing the MPD. Left at that, the rule clearly prohibits speech. However, the rule goes on to prohibit only such talking, writing or other expression which is defamatory, obscene or unlawful. Such speech is not protected by the Constitution, thus Defendants argue, it follows that a rule prohibiting such speech would not be unconstitutional. Finally, the rule prohibits any talking, writing or other expression which "tends to impair the operation of the department by interfering with its efficiency; interfering with the ability of supervisors to maintain discipline" or was " made with reckless disregard for truth or falsity." This language reiterates the Pickering balancing factors discussed above and incorporates an element of the actual malice standard for public figure libel actions. While the last section of the rule is more problematical as it is more open to criticisms of vagueness, the language of the rule is tailored enough to prohibit only such speech that is false and interferes with the operation of the police department. Accordingly, the Court finds that Mentor Police Department Rules and Regulations 2.1-14: "Criticism" is not unconstitutional on its face.

Plaintiff contends that Rules 2.1-1 "Unbecoming Conduct" and 2.1-8 "Insubordination" are unconstitutionally vague and/or over broad. Rule 2.1-1 provides that "Officers shall conduct themselves at al times, both on and of duty, in such manner as to reflect most favorably on the department. Conduct unbecoming an officer shall include that which brings the department into disrepute or reflects discredit upon the officer as a member of the department or that which impairs the operation or efficiency of the department or officer. Rule 2.1-8 states that "failure or deliberate refusal of any member or employee to obey a lawful order given by a superior officer shall be insubordination." On their faces neither Rule 2.1-1 nor 2.1-8 prohibits speech or even impacts speech. These are fairly common rules in police departments and reflect the need for public officers to strive to conduct

themselves in an appropriate manner and for police departments to keep their forces organized. The Court has reviewed Plaintiffs' filings with respect to these rules and finds no relevant authority to support their claims that these rules are unconstitutional.

The other three general orders cited as unconstitutional by Plaintiffs refer to the MPD's rules regarding news releases and public information officers. Mentor Police Department General Order 54.1.5(B) states when a public information officer is available and indicates that supervisors should answer questions when a public information officer is unavailable. The rule does not prohibit anyone from speaking. It merely identifies the authorized speaker for the Mentor Police Department. Mentor Police Department General Order. 54.1.10 advises Mentor police officers to keep the Public Information Officer informed of newsworthy events in the Department. Once again the rule does not prohibit speech. Finally, Mentor Police Department General Order 54.1.9(B) involves new releases regarding criminal investigations. Subpart (B)(7) complained of by Plaintiffs provides that "no opinion concerning the merits of the case or quality of the evidence will be expressed." While this rule prohibits some speech, the speech prohibited is very narrow and concerns the most sensitive aspect of police work-ongoing criminal investigations and prosecutions. The Court finds that the prohibition on speech engendered by this provision is minimal and that the rule is narrowly tailored to achieve an important government interest--the maintenance of the integrity and efficacy of its criminal investigations and prosecutions. Accordingly, Defendants are entitled to summary judgment on Count VI of the Complaint.

CONCLUSION

For the reasons set forth above, the Motions of Defendants for Summary Judgment (ECF #25, #26 and #27) are GRANTED.

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED:June 3, 2003

APPENDIX –ORDER DENYING REHEARING
No. 03-3915

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Steven Graham, Et Al.,
Plaintiffs-Appellants,

v.

ORDER

City of Mentor, Et. Al.,
Defendants-Appellants.

BEFORE: SILER, BATCHELDER, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

FILED: FEB 01, 2005

(3)

04-1496

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FILED
JUN 8 - 2005
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In The
Supreme Court of the United States

DANIEL GREIN; TIMOTHY BAKER,
Petitioners,
v.

CITY OF MENTOR; ET AL.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF THE *AMICUS CURIAE* ON THE MERITS IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Ohio Patrolmen's Benevolent Association ("OPBA") respectfully submits this brief in support of the petitioner for a writ of certiorari in this case.[1]

The OPBA is a labor union created under the Laws of the State of Ohio and represents law enforcement officers across the State of Ohio. As such, the OPBA is the exclusive bargaining agent for over six thousand (6,000) public employees acting as law enforcement officers and other associated positions such as correction officers, deputy sheriffs, dispatchers, and clerks. The OPBA advances the interests and legal rights of law enforcement officers and associated public employees through advocacy and education. The OPBA is, and at all times relevant to this case was, the lawful exclusive bargaining agent for the police officers of the City of Mentor, Ohio, including Petitioners Daniel Green and Timothy Baker. The OPBA further provides various legal representation to its members including representation in the event of discipline and/or termination from employment, defense of members in both criminal

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amici curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

and civil suits and, representing members as plaintiffs before various courts for civil matters related to their employment and the protection of their interests and rights.

The members of the OPBA and the organization as a whole has a significant interest in the important issue now before this Court, specifically clarification of the law concerning their fundamental rights granted under the First Amendment. Hence, it is imperative that those rights be protected, not violated, as they were in this case. The *amicus curiae* asks that this Court grant review in order to provide the lower courts with clear directives on how to resolve the issues presented, so that police officers and other public employees can engage in activities protected by those rights without constant fear of reprisal, and can expect consistent rulings pertaining to those rights among and within the circuit courts of appeal.

In summary, the OPBA respectfully requests that certiorari be granted in the instant case so that the First Amendment rights of public employees, and specifically police officers, will be guaranteed equal protection under the law.

STATEMENT OF THE CASE

The *amicus curiae* concurs with the Statement of the Case contained in the Petitioner's Petition for Writ of Certiorari and will not ask the Court to read it again by restating it herein.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted for three primary reasons. First, there currently exists a split among the Circuits with the opinion of the Sixth Circuit conflicting with those issued by the other judicial Circuits. The Circuits differ in their opinions as to their interpretation of the level of First Amendment protection that is, or should be, given to whistleblowers.

Second, there is an obvious difference in speaking on matters of public concern and true whistleblowing. Public employees recognize the difference and often find that speaking on matters of public concern draws the consternation of their employer whereas true whistleblowing often results in industrial capital punishment ... termination. The public employees who find it within themselves to expose corruption in the workplace should be afforded a higher level of First Amendment protection than those who speak simply on matters of public concern.

Finally, it is patently unfair to permit the person accused by the whistleblower to be the decision maker as to whether the actions of their accuser disrupt the department. To do so only permits the accused party to place their thumb on the scale so to speak. In balancing this issue common sense dictates that the scale must at least begin in favor of protecting the whistleblower. Any protection afforded by the First Amendment quickly becomes illusionary

when the accused party is permitted to retain the ability to render this delicate balancing.

1. An interpretation of the Pickering balancing test is needed to resolve the conflict among the Circuits.

The *amicus curiae* concurs with the Petitioners that there exists a conflict among the Circuits in similar cases sufficiently so that an interpretation by this Court is needed to resolve the conflict and ensure consistency among the Circuits. The *amicus curiae* suggests that such consistency is vital to ensure that public employees, in this case police officers, can know precisely where their protection lies when choosing whether to step forward and expose corruption in the workplace.

2. A higher level of protection should exist for whistleblowers than currently exists for other speech on matters of public concern.

There is an obvious difference between merely speaking on matters of public concern and being a true whistleblower. The whistleblower takes a step beyond simply speaking out on matters of public concern, the whistleblower steps into the spotlight and points an accusing finger, usually at a supervisor or a person who may hold the whistleblower's employment fate in his hands, and alleges corruption, wrongdoing, or greed. For this, the whistleblower

should be afforded a higher level of protection when exercising a First Amendment right.

Perhaps in no form of employment does speaking on matters of public concern or whistle-blowing carry such stigma or, deserve an increased level of protection, than in law enforcement. Law enforcement, by its very nature, is a para-military organization wherein public criticism of the organization or a superior is typically prohibited by rule or policy and, if violated, usually results in severe punishment. A law enforcement officer may speak on matters of public concern as a First Amendment right and enjoy a level of protection but the topics on which he speaks are usually general in nature, concern organization policy and, are often known to many persons including the public at large. Such issues usually do not involve criminal activity or corruption and, are not typically concerning a single (or very few) person(s). Some such topics may include things like allocation of manpower or training, budget and spending issues, or maybe lack, or abundance, of equipment. A whistleblower by contrast typically speaks to issues known by very few people, on issues that are contrary to organization policy, concerning actions of a single (or very few) persons and, about acts that are often criminal in nature. Another unique aspect of the whistleblower is found in the manner in which he comes by the damaging information, through his employment in the organization. The whistleblower steps outside of the traditionally private Employer/employee or, supervisor/subordinate relationship and points the accusatory finger on the

basis of the information gained by virtue of that very relationship.

This Court should extend more protection to the whistleblower by reviewing the Pickering balance test and coming forth with a higher level of protection unique to whistleblowers, a protection equal to the risks to which a whistleblower exposes himself.

3. The person accused by the whistleblower must not be permitted to be the decision maker as to whether the actions of the whistleblower disrupt the department.

Few things in life are this clear but, if they were not, we could easily justify the fox eating the hen for squawking a warning to others that the fox had entered the henhouse. After all, the fox would claim, she disrupted the henhouse. The law now permits the fox, and in our case Chief Amiott, to make this decision. Such authority is patently unfair and requires a higher level of protection for the whistleblower if the form of removing that person from the decision-making process.

Such a higher level of protection is required to ensure that the whistleblower receives at least a fair evaluation of his actions. Like the fox, the person accused by the whistleblower would certainly like to silence the squawking whistleblower as immediately and certainly as possible. What better way to remove the threat than by inflicting the industrial capital

punishment of termination on the whistleblower for "disrupting" the department. When the accused is permitted to make this decision we will always question whether the actions disrupted the department or, maybe just the actions of the accused. We should not be left with this question and the only way to resolve it is to remove the authority of the accused to render this decision.

The balancing test of Pickering requires just that, balancing. The Third Circuit determined, and rightly so, that a whistleblower exposing rampant corruption may no doubt disrupt and demoralize the office but that the "First Amendment balancing test [of Pickering] can hardly be controlled by a finding that disruption did occur." O'Donnell v. Yanchulis, 875 F.2d 1075 at headnote 5 (3rd Cir. 1989), emphasis in original. When the accused person is permitted to make the decision as to whether the actions of the whistleblower caused disruption we allow the accused to place his very own thumb on that scale as a means to eliminate his accuser. By no stretch of the imagination can this be considered fair.

This Court must ensure that whistleblower are afforded a higher level of protection by announcing that the person accused by a whistleblowers cannot be permitted to be the decision maker as to whether the actions of the whistleblowers disrupt the department.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* Ohio Patrolmen's Benevolent Association urges this Court to accept review of this case in order to clarify the law regarding the issues of free speech and whistleblowing presented by this case and to resolve the inconsistent application of the law throughout the country. These are significant constitutional issues which have not been resolved and are therefore the source of an ever-widening split among the circuit courts. Guidance from this Court would clarify the First Amendment rights of government employees, especially law enforcement officers.

Therefore, *amicus curiae* respectfully requests that this Honorable Court grant the instant petition for writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted this 8th day of June, 2005.

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No. 04-1496

In The
Supreme Court of the United States

DANIEL GREIN and TIMOTHY BAKER,

Petitioners.

v.

CITY OF MENTOR, RICHARD AMIOTT, JULIAN SUSO, EDWARD WALSH, and RICHARD HENNIG,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Sixth Circuit Court of Appeals properly applied the *Pickering* balancing test and correctly affirmed the District Courts Dismissal of Petitioners' First Amendment Retaliation claim.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, John T. McLandrich, Counsel of Record for Respondents, City of Mentor, Richard Amiott, Richard Hennig, Julian Suso, and Edward Walsh state that the City of Mentor, Richard Amiott, Richard Hennig, Julian Suso, and Edward Walsh is not a publicly held corporation and has no shares held by a publicly traded company.

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STATEMENT OF THE CASE

Petitioners' statement of the case evidences an unfortunate attempt to re-litigate facts which Petitioners never proved, while at the same time ignoring the **thousands of pages** of evidence relied upon by the District Court as well as a unanimous Sixth Circuit Court of Appeals.

Petitioners were police officers for the City of Mentor, Ohio, and active officers in the police union. (Pet. App. 6a). As union officers, Petitioners engaged in the tactic of a smear campaign against City of Mentor Police Chief Richard Amiott. (Pet. App. 17a-29a). As a result of their overzealousness, City of Mentor Police Department's Rules and Regulations, as well as local laws, were violated. For example, and without limitation, the Sixth Circuit Court of Appeals correctly recited the uncontroverted facts that:

> The officers also allegedly harassed a local bar owner who had not supported the police union. They allegedly forced a security guard to send a letter critical of [Chief] Amiott to a local newspaper. They inappropriately obtained documents concerning "voided" tickets and [Chief] Amiott's shooting records. Each time the officers took an issue to the press, they did so immediately, before Mentor could investigate the allegations.

(Pet. App. 7a).

Pursuant to the collective bargaining agreement between the City of Mentor and the Petitioners' union, the City recommended discipline against the three officers based on their misconduct. (Pet. App. 7a). An independent Arbitrator, agreed to by Petitioners' union, determined that Union President Graham should be terminated for any one of the three of four charges levied against him. (Pet. App.

21a). The Arbitrator rejected Graham's argument that he was being retaliated against for his First Amendment activities. Further, the Arbitrator found that Graham was discharged for threatening a citizen, interfering with investigations, and participating in improper complaints. (Pet. App. 21a). Notably, the Arbitrator also determined that Graham's conduct in "criticizing Chief Amiott and condemning his actions on various grounds with the specific purpose of destroying the community support that was so important to successful and efficient police operations" was unbecoming conduct which could not be tolerated. (Pet. App. 21a).

Similarly, Petitioner Grein was discharged by an independent arbitrator. (Pet. App. 26a). The arbitrator rejected Petitioner Grein's argument that he was disciplined in retaliation for exercising his First Amendment speech. (Pet. App. 26a). The Arbitrator determined, following a four-day hearing, that Petitioner Grein intended to destroy the public respect for the Police Department. (Pet. App. 26a).

Regarding Petitioner Baker, the arbitrator determined that, while the charges brought against Petitioner Baker were not done so because of any improper motive on behalf of the City, termination was not a proper discipline considering Baker's role in the misconduct of the other Union officers. (Pet. App. 28a-29a).

Petitioners omit the fact that there was an abundance of evidence which illustrated the destructive effect on the Mentor Police Department, all of which resulted as a consequence of Petitioners' campaign against Chief Amiott. For example, Mentor Police Detective Edward Ziegman, a 13-year veteran of the Mentor Police Department, testified

at Mr. Grein's arbitration that the Petitioners' smear campaign made the department look bad and divided the Department. (Pet. App. 41a). The Arbitrator in Petitioner Grein's arbitration found that when Petitioner Grein made derogatory public comments to the media about Chief Amiott and the department, he *intended* to destroy the public respect for the police department. (Pet. App. 26a). Mr. Graham's arbitrator found that Graham's conduct had the "specific purpose of destroying the community support that was so important to successful and efficient police operation." (Pet. App. 22a).

Finally, note that while both the District Court and a unanimous Sixth Circuit Court of Appeals appropriately applied the *Pickering* balancing test, the Sixth Circuit Court of Appeals observed that the City of Mentor "presented sufficient evidence to prove that the City would have terminated the employment of Graham and Grein in the absence of any protective conduct." (Pet. App. 11a). Grein and Graham do not argue that their terminations would not have been upheld based on their misconduct (threatening citizens, improperly obtaining records, destroying computer records, etc.), regardless of their allegedly protected conduct. *See, Mt. Healthy City Bd. of Educ.*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977).

REASONS FOR DENYING THE WRIT

I. There is No Conflict Between the Circuit Courts Regarding the Correct Standard to be Applied in First Amendment Retaliation Cases.

A. The Sixth Circuit Court of Appeals correctly evaluated the facts and law relative to Petitioners' First Amendment retaliation claim and accurately applied the fact-specific *Pickering* balancing test.

Petitioners' Petition for Writ of Certiorari does not, in fact, illustrate any "split" amongst the Circuits. Petitioners merely located approximately four cases wherein a Circuit Court found that Plaintiffs *may* be able to prove to a jury that they were disciplined as a result of exercising their rights of free speech. (Pet. App. 6-8).

Here, the Sixth Circuit accurately and concisely set forth the law regarding a First Amendment retaliation claim. The Sixth Circuit set forth the well-established principle that a government employer cannot retaliate against a public employee for exercising their right to speak freely. However, the public employees' right to speech is not limitless. To establish a prima facie case of retaliation under 42 U.S.C. § 1983, the employee must show that: 1) he was engaged in constitutionally protected activities; 2) he was subjected to adverse action or deprived of some benefit; and 3) the protected speech was a substantial or motivating factor in the adverse action. *Leery v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). If the employee can make this showing, the burden shifts to the employer to prove, by a preponderance, that "it would have taken the same action even in the absence of the protected conduct." *Jackson v. Leighton*, 168 F.3d 903, 909

(6th Cir. 1999) (citing *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977)).

To prove that an employee's speech is protected, employees must satisfy a two-prong test: 1) that the speech involved "matters of public concern or interest", *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001); and 2) that the employee's interest in the speech outweighs the employer's interest in "promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 205, 391 U.S. 563, 568, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968).

After evaluating the Petitioners' speech, the Sixth Circuit determined that Petitioners' unfounded allegations that Chief Amiott was unqualified to carry a weapon, and further, their allegation that they were subjected to issuing or meeting "ticket quotas" may be an issue of public concern. (Pet. App. 9a-10a). The Sixth Circuit thereafter thoughtfully applied the *Pickering* balancing test. (Pet. App. 10a).

Therein, the Sixth Circuit recognized the well-established rule that the City has an interest in maintaining an effective police force, free from internal division. *Brown v. City of Trenton*, 867 F.2d 318, 322-23 (6th Cir. 1989). When a police officer's speech is "reasonably calculated to create division", the speech may be unprotected because of its potential negative effect on the public. *Id.* at 322. Furthermore, the Sixth Circuit recognized the established principle that a police chief cannot be expected to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy

close working relationships." *Id.* at 323 (quoting *Connick*, 461 U.S. at 155). Moreover, the Sixth Circuit cited law that a city cannot be expected to tolerate officers who use the media to disrupt the behavior in the work place and to influence personnel changes. The Sixth Circuit faced this exact scenario in the matter at issue. *McMurphy v. City of Flushing*, 802 F.2d 191, 198 (6th Cir. 1986). (Pet. App. 10a). Accordingly, the Sixth Circuit recognized that the *Pickering* balancing test is a question of law that involves a *fact specific inquiry.* (Emphasis added). *Williams v. Kentucky*, 24 F.3d 1526, 1537 (6th Cir. 1994).

Petitioners and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association fail to recognize the importance of maintaining morale and authority within a police department. Indeed, both Petitioners and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association petition this Court under the mistaken belief that Chief Amiott was the ultimate decision-maker in terms of whether or not Petitioners' misconduct was sufficiently disruptive to the operations of the Mentor Police Department. The record is clear that the *Arbitrators* concluded, based on hundreds of newspaper articles as well as the testimony of Detective Zigman, that Petitioners' conduct was objectively abhorrent and designed with the specific agenda of disrupting the Department. (Pet. App. 41a). The Sixth Circuit recognized that the Arbitrators' findings, Detective Zigman's testimony, the newspaper articles, as well as the Officers' own conduct was objective evidence of unacceptable, disruptive behavior. Petitioners' and their *Amicus Curiae* Ohio Patrolmen's Benevolent Association's argument that Chief Amiott should not have been the party to determine if the "whistleblowing" behavior was sufficiently disruptive is creative. (Brief of *Amicus Curiae* Ohio Patrolmen's

Benevolent Association, 6) However, their argument is not supported by any evidence in the record, and therefore, was never a part of the Sixth Circuit's analysis in the first place.

Petitioners have seemingly ignored the express contours of the law. By merely citing to cases with very different factual scenarios, Petitioners would lead this Court to believe that there is a "split" among the Circuits. Such is not the case.

Indeed, the Sixth Circuit's application of First Amendment retaliation law to the facts at hand was thorough and unremarkable. Petitioners argue that the Sixth Circuit misapplied the law, but they then proceed to argue nothing but the facts. The inescapable reality of Petitioners' Petition for Writ of Certiorari is that the law was uniformly and correctly applied. Petitioners are simply unhappy with the result.

A review of the cases Petitioners cite in support of their argument that there is a split between other circuits and the Sixth Circuit illustrates Petitioners' fundamental misunderstanding of First Amendment law.

For example, the first of Petitioners' "conflicting" cases, *O'Donnell v. Yanchulis*, 875 F.2d 1075 (3d Cir. 1989), involves a First Amendment retaliation claim wherein the Defendant/Employers argued that, as a result of Plaintiff's protected activity, the relationship between Plaintiff and his supervisors had completely deteriorated. The Third Circuit determined, after weighing the evidence pursuant to the *Pickering* balancing test, that a deterioration between a Plaintiff and his supervisors in a First Amendment retaliation case was not unexpected, and further, was an insufficient basis for the District Court to grant summary

judgment. Indeed, the Third Circuit specifically stated "the Defendants attempt, as did the District Court, to justify their decision to terminate O'Donnell solely on the basis that the working relationship *between O'Donnell and the supervisors* had completely deteriorated." (Emphasis added). *Id.* at 1062. More importantly, and as apparently lost on the Petitioners in the matter herein, the Third Circuit not only applied the *Pickering* balancing test, they focused on the fact-specific nature of the balancing test.

Petitioners engaged in an unrelenting campaign to oust the Police Chief. The overwhelming evidence, as determined by the Arbitrators, the District Court, and the Sixth Circuit, was that Petitioners' conduct was a clear violation of department policies and procedures, if not unlawful, and had an almost debilitating effect on the entire department.

Similarly, Petitioners' reliance on the 1984 case of *O'Brien v. Town of Caladonia*, 748 F.2d 403 (7th Cir. 1984) is misguided. In *O'Brien*, not only did the Seventh Circuit apply the same *Pickering* balancing test as the Sixth Circuit, the Seventh Circuit determined that Plaintiff Officer O'Brien was disciplined pursuant to unconstitutional provisions of the Caladonia Police Department's policy and procedure manual. *Id.* at 406.

Petitioners also curiously cite to two cases out of the Ninth Circuit, *Hufford v. McEnaney*, 249 F.3d 1142 (9th Cir. 2001), and *Rivero v. City and County of San Francisco*, 316 F.3d 857 (9th Cir. 2002). First, the *Rivero* case does not involve an employee/employer relationship. While the Ninth Circuit applied the same *Pickering* balancing test as the Sixth Circuit in the matter at issue, the *Rivero* case involved a municipality's cancellation of a contract with a

mortuary. Petitioners' citation to a non-employment case as support for their argument that there is a "split" amongst the circuits illustrates more than poor judgment. The *Rivero* case, which determined that the evidence of retaliation (Defendants potentially placing exploding pacemakers in Plaintiff's viscera), coupled with the evidence of Plaintiff's whistleblowing which lead to the cancellation of Plaintiff's contract (false billings, false reporting of funeral cases, illegal embalming of bodies, and bribes and kickbacks – all leading to a grand jury investigation which resulted in a report critical of the Defendants), was sufficient to create a question of fact for the jury. *Id.* at 860, 866.

Finally, Petitioners' superficial valuation of *Hufford* is of no value to their Petition. Again, the Ninth Circuit applied the same *Pickering* balancing test as the Seventh Circuit. However, the facts in *Hufford* evidenced that the Plaintiff Fire Department Captain had, indeed, uncovered a cache of pornography, including child pornography, on the Fire Department's house-station computer. *Id.* at 1145. Despite the fact that Plaintiff-Captain *Hufford* had never been the subject of discipline prior to his uncovering the pornography, he was subsequently subject to a series of discipline for conduct which it was unclear whether or not he had engaged in.

In the matter at issue, Petitioners claim to be "whistleblowers" despite the fact that they improperly obtained evidence and immediately presented their misguided beliefs to the media. It is undisputed that there were no criminal charges, internal or external discipline, or other reprimands against Chief Amiott.

Respondents further note that even a cursory review of recent case law out of the Third, Seventh and Ninth Circuits would have revealed that there is no "split." Indeed, Petitioners are able to cite to *no case* that reveals a "new, higher standard", or a different standard, for applying the well-established *Pickering* balancing test. *See*, for example, *Muti v. Schmidt*, 118 Fed. Appx. 646 (3d Cir. 2004), wherein the Third Circuit upheld the dismissal of an employee's First Amendment retaliation claim at the Motion to Dismiss stage. The *Muti* court balanced the employee's interests against the employer's consideration as to "whether the [expression] impairs discipline by superiors or . . . *has a detrimental effect on close working relationships for which personal loyalty and confidence are necessary*, or . . . interferes with the regular operation of the enterprise. (Emphasis original). *Id.* at 648 (citing *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)).

Petitioners also overlooked *Brooks v. University of Wisconsin Bd. of Regents*, 406 F.3d 476 (7th Cir. 2005), wherein the Seventh Circuit upheld the District Court's dismissal of an employees' First Amendment retaliation case. Similarly, Petitioners apparently ignored the Seventh Circuit's decision in *Careon, et al. v. Illinois Dept. of Human Srvs.*, 395 F.3d 786 (7th Cir. 2005), wherein the Seventh Circuit affirmed the District Court's decision to grant summary judgment in an employee's First Amendment retaliation case. Clearly, the Seventh Circuit considered that, even in the face of employee speech on matters of public concern, the government may "restrict the speech if it can carry its burden of proving that the interest of the public employee as a citizen and commenting on the matter is outweighed by the interest of the

State, as employer, in promoting effective and efficient public service." *Id.* at 791 (citing *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002)).

Similarly, the Petitioners did not consider *Hudson v. Craven*, 403 F.3d 691 (9th Cir. 2005) wherein the Ninth Circuit affirmed the dismissal of an employee's First Amendment retaliation case. In *Hudson*, the Ninth Circuit thoughtfully and systematically applied the *Pickering* balancing test. Indeed, after determining that Plaintiff's First Amendment association was "quintessentially a matter of public concern", the Court held that "*Hudson's* claim fails because her associational interests in this context are strongly outweighed by the legitimate administrative interests of Clark College." *Id.* at 699.

Accordingly, Petitioners' allegation that there is a "split" between the circuits is patently wrong.

II. Petitioner did not bring a claim pursuant to the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)(A).

Petitioners' request Certiorari for this Court to consider a higher standard for whistleblowers in First Amendment retaliation cases. Petitioners' request for a Writ of Certiorari should also be denied based on the fact that they never brought a cause of action pursuant to the Whistleblower Protection Act at 5 U.S.C. § 2302(b)(8)(A). Accordingly, the level of protection afforded to a Whistleblower pursuant to the Act is not an issue properly before this Court. Moreover, the level of protection afforded to "whistleblowers" was never an issue addressed by the District Court or the Sixth Circuit Court of Appeals. It is axiomatic that Petitioners' argument that this Court

should adopt a "strict scrutiny" standard for whistleblowers cannot be raised for the first time in their Petition for Writ of Certiorari to this Honorable Court.

Furthermore, Petitioners' argument that whistleblowers should be granted a strict scrutiny level of protection in First Amendment retaliation cases is not supported by any case in any District or Circuit. (Pet. App. 10-19).

Accordingly, despite Petitioners' argument that one commentator in an Ohio Northern University Law Review article has "suggested" that whistleblowers should be protected by a "strict scrutiny analysis" in First Amendment retaliation cases, Petitioners' novel argument is without precedent and is an insufficient basis upon which to grant Certiorari. (Pet. App. 10-12).

III. Alternate grounds exist to justify the decisions of the District Court as well as the Sixth Circuit Court of Appeals.

Finally, Petitioners' request for Certiorari should be denied on the basis that alternate grounds exist which support the District Court's and the Sixth Circuit Court of Appeals' decision.

As indicated, the evidence before the District Court was that an independent, union-endorsed Arbitrator determined that Officer Graham could have been terminated for any one of the three of four charges brought against him. (Pet. App. 21a). The Arbitrator found that "grievant was discharged for *threatening* Mr. Spetrino improperly, intervening in and publicizing investigation and participating in improper complaints, all of which were unbecoming conduct which impaired the morale, reputation, and

efficiency of a great Police Department." (Pet. App. 21a). Similarly, Officer Grein's termination was instituted by a separate Arbitrator. The Arbitrator determined that Grein should be terminated for his conduct which included: 1) advising other Mentor Police officers that there was a "no tolerance policy" for Mr. Spetrino (a local business owner who refused to permit a yard sign at his business which demonstrated his support for the Police Union over Chief Amiott); 2) improperly obtaining Chief Amiott's shooting qualification/range records from a closed file area and subsequently, and untruthfully, reporting to the media that the records reflected Chief Amiott was not range qualified; 3) repeatedly crashing the City of Mentor Police Department dispatch computer system; 4) prompting a local mall security guard to write a letter critical of Chief Amiott for the local newspaper; and 5) disclosing details of ongoing internal investigations to the news media. (Pet. App. 22a-25a).

In the face of the officers' unprecedented malfeasance and embarrassing behavior, the Sixth Circuit stated that "although the Plaintiffs' claims do not survive *Pickering* balancing, Mentor presented sufficient evidence to prove that the City would have terminated the employment of Graham and Grein in the absence of any unprotected conduct. *See Mt. Healthy City Bd. of Educ.*, 429 U.S. at 287; *see also Cockrel*, 270 F.3d at 1057." (Pet. App. 11a).

Accordingly, based on the fact alternate grounds existed for the District Court and Sixth Circuit Court of Appeals to grant the City's Motion for Summary Judgment, Petitioners' request for Writ of Certiorari should be denied.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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